Georgia Defense Lawyers Association
Advancing the Civil Defense Bar©
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GEORGIA DEFENSE LAWYER©

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Spoliation: Reasonable Foreseeability is the New Old Standard

By Garret W. Meader
Drew Eckl & Farnham, Brunswick

A customer in a sporting goods store injures his shoulder after attempting to test weightlifting equipment that was present on a display. The incident is captured by the store's video surveillance system. Pursuant to store policy, the store manager photographs the area, takes statements from the customer, interviews employees who witnessed the incident, and provides notice of the incident to the human resources/risk management department. Unbeknownst to the store, the customer sustained a serious tear of his rotator cuff. The store does not have any other contact with the customer for the next 23 months. Is the store on notice of contemplated litigation? The answer may surprise you.

A recent decision by the Supreme Court of Georgia has overruled numerous cases decided by the Georgia Court of Appeals defining when a party's obligation to preserve evidence is triggered. *Phillips v. Harmon*, -- S.E.2d -- (2015), 2015 WL 3936826.

As a result of this decision, an unwary party may find itself on the receiving end of the rebuttable presumption that can arise when evidence is destroyed or not preserved. The decision by the Georgia Supreme Court makes it clear that factors which were not previously dispositive of the issue, such as a party's internal investigation of an incident, may be sufficient to trigger a duty to preserve—even if the injured party has not provided express or actual notice of an intention to litigate. The decision by the Supreme Court overrules many years of decisions by the Georgia Court of Appeals which found the distinction between "notice of potential liability" versus "notice of potential litigation" to be significant.

As we know, spoliation refers to the destruction or failure to preserve evidence which is necessary to contemplated or pending litigation. If a party is found to have destroyed or failed to preserve relevant evidence, then a rebuttable

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Inside This Issue

GDLA Elects Officers and Board

The GDLA held its 48th Annual Meeting at Hammock Beach Resort in Palm Coast, Fla., June 11-14, 2015.

During the Business Meeting on Saturday, a proposed amendment to Bylaw Article III, Section 4 passed; it expedites the process of admitting new members. See article on page 14.

Next, GDLA members unanimously accepted the report of the Nominating Committee thereby electing the 2015-2016 officers and Board of Directors. Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske in Atlanta took the reins as President. See pages 52 - 56 for highlights.

As is tradition, newly-sworn President Matt Moffett presented outgoing President Kirby Mason with a gavel plaque commemorating her year of leadership and service.

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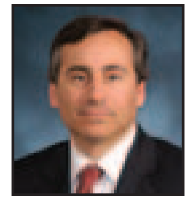
President's Message



As I begin my year as your President, I am honored to build upon the foundation laid 48 years ago, and I am humbled to follow so many legendary litigators who have led this great association. I have several goals whose time, I believe, have come.

It is time to clearly define our brand and message. Like DRI is nationally, we are the organized voice of the civil defense bar in Georgia. We hail from all four corners of the state and all firm sizes, and we defend every foreseeable type of lawsuit across a range of industries—and not just insurance. We have even opened our doors to those lawyers working in a government setting on the defense side. Committed to the reasonable and professional defense under law for our clients, we are the lawyers on the "*right* side of the v."

It is time to reach across to our peers in GTLA. I have great respect for lawyers like GTLA President Darren Penn and my friends on the other side. I am the son of a great plaintiff's lawyer, and I know they believe in the fight for justice under law. I like to say if you're a litigator in Georgia, then you need to pick a side—GDLA or GTLA—and join that group. There's strength in a unified front. It helps both sides to be better and that leads to an improved justice system. Yes, we are adversaries but only professionally, and I look forward to having a couple of joint events with GTLA over the next year—particularly at a less formal bar than the one we pass in court.

It is time to honor our past presidents. They brought us to where we are today and gave the GDLA a strong foundation for excellence. In combination with our judicial reception next February, we will hold an event to honor and formally thank these great GDLA leaders.

It is time to train up our younger lawyers. And we are doing just that, helping them to become more competent and professional for our clients by educating them on the law and rules of our courts. From our Trial & Mediation Academy to Deposition Boot Camp to Mediation 360° to Skits & Suds/Ethics & Professionalism, we have excellent faculty and instruction so that all defense firms can send their lawyers to us to get better. It is the best investment any defense firm will make for their future.

It is time to expand our ranks and bring every civil defense lawyer under the tent. I encourage every GDLA member to take a moment and look around to see who hasn't yet joined our efforts to advance the civil defense bar in Georgia. If you don't want to ask someone, then you can easily search online by visiting "Find a Defense Lawyer" on our website.

As you consider recruiting members, I am pleased to report that the GDLA Board recently approved free one-year memberships for DRI members who have not been a member of the GDLA in the past five years. In an effort to diversify our ranks, the Board also approved a complimentary year for members of Multi-bar Leadership Council (MBLC) bar associations like Gate City, GABWA, Stonewall Bar, etc., who would otherwise qualify for GDLA membership. So, if you know civil defense lawyers who fit these two categories—DRI or MBLC—then be sure they're aware of the offer. (See article on page 14.)

It is time to clearly communicate the value of joining the GDLA. I've heard prospective members decline to join, explaining they don't have time to be actively involved with another organization. In the case of the GDLA, membership is as much about solidarity as anything. Plus, we have a number of member benefits that can be "for consumption" only. For example, this award-winning

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Member News and Case Wins

Member News

Lynn M. Roberson, GDLA Past President and partner with *Swift Currie McGhee & Hiers* in Atlanta, was recognized by the *Georgia Association for Women Lawyers* with its highest honor, the Kathleen Kessler Award, during its Annual Meeting on May 8. She also was presented a Distinguished Service Award by the *Atlanta Bar Association* at its Annual Meeting on May 19. In addition, Ms. Roberson was selected to receive the Commitment to Equality Award from the *State Bar of Georgia's Committee to Promote Inclusion in the Profession*. The honor was bestowed on June 11 at the National Center for Civil and Human Rights in Atlanta.

James E. (Jimmy) Singer, GDLA Past President and partner with *Bovis Kyle Burch & Medlin* in Atlanta, has been appointed General Counsel of the Georgia State Golf Association, which will be celebrating its 100th year in 2016.

Patrick T. (Pat) O'Connor, managing partner of *Oliver Maner* in Savannah, was elected Treasurer of the State Bar of Georgia. He previously served as a member of the State Bar's Board of Governors and Executive Committee and, for the prior year, as its Secretary.

Nicole C. Leet, an associate with *Gray Rust St. Amand Moffett & Brieske* in Atlanta, was elected Treasurer of the State Bar of Georgia's Young Lawyers Division (YLD). She previously served the YLD as its Secretary.

Kevin C. Patrick, an associate in the Atlanta office of *Goodman McGuffey Lindsey & Johnson*, was named co-editor of the State Bar of Georgia's YLD newsletter.

Edward T. McAfee, a partner with *Lewis Brisbois Bisgaard & Smith's* Atlanta office, was elected to the Executive Committee of the Lawyers Club of Atlanta.

Susan K. Murphey, formerly with *Schulten Ward & Turner*, has joined *Murphey's Law Firm* as a partner. Ms. Murphey will continue to practice in the areas of insurance defense and coverage, as well as employment law, including advising employers in discrimination/ harassment, wage and hour, restrictive covenants and I-9 issues.

Huff Powell & Bailey in Atlanta announced that **Taylor Tribble** is now a partner with the firm. Ms. Tribble's practice is focused on medical malpractice defense.

Taylor English Duma announced that **Roy Harold (Hal) Meeks, Jr.** has joined the firm in its Atlanta office. Mr. Meeks has tried well over 100 bench and jury trials, and handled binding arbitrations, in substantive areas including medical malpractice defense, health care industry disputes, securities defense, construction claims, and general commercial/contract disputes.

Two GDLA members were newly-elected to a two-year term on the Board of Governors of the State Bar of Georgia: **Gary S. Freed**, a partner with *Thompson Hine* in Atlanta, representing the Stone Mountain Circuit in Post 4; and **John B. Manly**, an associate with *Bouhan Falligant* in Savannah, representing the Eastern Circuit in

GDLA's Richardson Award Presented at UGA Law School

GDLA Vice President Craig Avery (right) was on-hand to congratulate Thomas Peyton Bell as the recipient of the 2015 Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award, sponsored by the GDLA, honors the memory of one the GDLA's founding members. The award was presented on April 17, 2015, by Dean Bo Rutledge during the 2015 Georgia Law Awards Program in the Hatton-Lovejoy Courtroom.

Post 4. The Board of Governors controls and administers the affairs of the State Bar.

Founded in 1975 in Rome, *Brinson Askew Berry Seigler Richardson & Davis* is celebrating its 40th anniversary this year. The firm represents local and national businesses, individuals and public entities throughout North Georgia and the metropolitan Atlanta area.

Richard E. Glaze, a partner with *Balch & Bingham* in Atlanta, was elected Chair of the Atlanta Bar Association's Environmental Law and Toxic Tort Section.

The *Daily Report* announced its 2015 class for "On the Rise—a selection of Georgia lawyers under the age of 40 who are making a difference in the community and will continue to do so in the future." GDLA members named to the list are: **Lindsay G. Ferguson**, a partner with *Weinberg Wheeler Hudgins Gunn & Dial* in Atlanta; **Lee M. Gillis, Jr.**, a partner with *James Bates Brannan Groover* in Macon; and **Scott R. Grubman**, a partner with *Chilivis Cochran Larkins & Bever* in Atlanta.

Gwendolyn D. Havlik, formerly with *Dennis Corry Porter & Smith*, has joined *Drew Eckl & Farnham* as an associate in the firm's Atlanta office. She focuses her practice on insurance defense, specializing in general casualty law.

Timothy J. Buckley III of the law firm *Buckley Brown* announced the formation of *Buckley Christopher & Haff*. The firm will continue to provide representation to its litigation clients with an emphasis on constitutional and governmental matters; casualty, transportation and products cases; and employment matters and employment-related issues, including workers' compensation claims. The firm is located at 2970 Clairmont Road NE, Suite 1010, Atlanta, Georgia 30329; (404) 633.9230; www.bchlawpc.com.

Sean B. Cox, formerly with *Goodman McGuffey Lindsey & Johnson*, has joined the transportation defense practice group at *Hall Booth Smith* in Atlanta. He focuses his practice on transportation liability defense and coverage litigation.

Gilson Athans in Atlanta announced that **Jeffrey A. Kershaw** has joined the firm as a shareholder. He was formerly in-house at *Hiscox USA* in Atlanta, and before that worked with Gilson Athans co-founder **Michael J. Athans** when both were with *Fields Howell Athans & McLaughlin*. Mr. Kershaw specializes in insurance coverage, including director and officer liability, employment practices liability, professional liability and general liability.

Dana Maine, a partner with *Freeman Mathis & Gary* in Atlanta, has been named Chair of the firm's Government Law Practice Section and will become a member of the firm's Executive Committee. For over 20 years, her national practice has focused on first amendment issues involving land use, sign ordinances and zoning, and also Section 1983 litigation involving law enforcement and civil rights. She was named "2013 Lawyer of the Year" for Atlanta Municipal Law by *Best Lawyers in America* and is a former chair of DRI's Governmental Law Committee. She was also part of the firm's team in the recently decided U.S. Supreme Court case of *Reed v. City of Gilbert*.

Anne D. Gower, J. Timothy Wooten and **Jason D. Darneille** announced the formation of *Gower Wooten & Darneille*. Ms. Gower and Mr. Darneille were formerly with *Crim & Bassler*, and Mr. Wooten had operated his own insurance defense firm for the last three years after several years as a partner with *Mozley Finlayson & Loggins*. **Robert W. Johnson** also joined the firm from Crim & Bassler as an associate. The new firm will focus on insurance defense, insurance coverage and extra-contractual liability claims in Alabama, Georgia, North Carolina and South Carolina. Their two offices are located at 1000 Parkwood Circle, Suite 900, Atlanta, GA 30339 and 223 West Stone Avenue, Greenville, SC 29069; (404) 662-2333.

LEAD Atlanta's 2016 class includes several GDLA members: **Sherrie M. Brady**, an associate at *Hawkins Parnell Thackston & Young* in Atlanta; **Jennifer W. McNeely**, an associate at *Waldon Adelman Castilla Hiestand & Prout* in Atlanta; and **Eliyahu (Elie) Wolfe**, an associate at *Nelson Mullins Riley & Scarborough* in Atlanta. The intensive eight-month leadership development and community education program is targeted at promising young professionals, ages 25-32, in metro Atlanta.

Several GDLA members were named by *The National Black Lawyers* to its list of "Top 40 Under 40" in Georgia: **Willie Ellis, Jr.**, a partner with *Hawkins Parnell Thackston & Young* in Atlanta; **Christina C. Hadley**, an associate in the Atlanta office of *Hall Booth Smith*; **Mariel E. Smith**, an associate in *Hall Booth's* Columbus office; and *Hawkins Parnell* Atlanta associate **Randi M. Warren**.

Brett Tarver, an associate with *Insley & Race* in Atlanta, has been selected to serve on the DRI Young Lawyers Steering Committee.

Case Wins

Philip W. Savrin, a partner in the Atlanta office of *Freeman Mathis & Gary*, with assistance from firm associate **Abby A. Vineyard**, obtained a defense verdict for Professional Boiler Services, Inc., in a case tried in the Superior Court of Richmond County. The suit was brought over two and one-half years ago by

Augusta Select Tissue, LLC, which operates a paper mill that depends on steam being produced 24 hours a day by an industrial boiler. The gas boiler exploded a few days after it was serviced by the defendant, causing property damage and claimed financial losses.

The defendant contended that it had advised the plaintiff repeatedly that the service had not been completed and that it asked the plaintiff to shut down production to allow for further troubleshooting. The plaintiff denied this, claiming it had a back-up electric boiler that it used while the gas boiler was being repaired, and that it would have switched to the electric boiler had the defendant advised that operation of the gas boiler was dangerous.

The 12-person jury heard from witnesses over the course of several days, including experts on both the technical aspects of boiler operations and the financial losses claimed by the plaintiff. Despite conflicts in the testimonies, the jury deliberated for only 15 minutes before finding for the defense. According to the foreperson, all 12 of the jurors thought it was clear that the defendant asked to troubleshoot from the interior of the boiler, and that the plaintiff hesitated to shut down the gas boiler due to the higher utility costs of operating the back-up electric boiler.

Although the jurors thought the defendant could have been clearer about its reasons for wanting to troubleshoot further, they also thought the plaintiff should have deferred to that request and not second-guessed whether a shutdown was truly needed.

An appeal of the verdict is not expected. Moreover, because a Rule 68 offer was made early on in the case, the defendant will be able to recover attorneys' fees and litigation expenses incurred under Georgia's version of the statute.

The case was *Augusta Select Tissue, LLC v. Professional Boiler Services, Inc.,* Superior Court of Richmond County, Case No. 2012-RCCV-638.

Downey & Cleveland in Marietta secured four defense verdicts in the course of a week in March 2015. The jury trials took place in four different counties in metropolitan Atlanta: Paulding, Henry, Gwinnett and Cobb.

In the first jury trial, **W. Curtis Anderson** and **Tara Parker** obtained a defense verdict in a wrongful death case in Paulding County. The trial involved an 18-year-old girl who was struck and killed by two vehicles. The decedent was wearing dark clothes and was not in a crosswalk. The plaintiffs argued that the defendant was driving too fast, distracted, and not wearing her required glasses. However, jurors were persuaded that the accident was not the fault of the defendant driver. The plaintiffs' attorneys had asked for up to $5 million.

In the second jury trial in Henry County, **Sean L. Hynes** successfully defended a World War II veteran accused of negligently causing a motor vehicle accident. Although the defendant admittedly turned left in front of the plaintiff's vehicle, jurors returned a defense verdict on grounds that the oncoming driver should have been able to react in time and avoid the collision.

Lorrin E. Mortimer obtained a defense verdict in the third jury trial in Gwinnett County. That suit involved a rear-end auto collision. At trial, the plaintiff was impeached on several material matters.

In the final jury trial in Cobb County, **J. Colby Jones** and **Kenneth M. (Ken) Barré, III** obtained a defense verdict on behalf of a homeowner in a premises liability case. The plaintiff sued after she tripped and fell on a metal hinge attached to an in-ground trash can. Her ankle became infected and required surgery. Jurors indicated that liability had not been proven against the homeowner and returned the fourth defense verdict for the firm.

"We're not a big firm," said Mr. Hynes. "It was unusual to have nearly half of us trying cases in different counties at the same time."

Daniel J. Huff, a partner at *Huff Powell Bailey* in Atlanta, obtained three defense verdicts in the first three months of 2015. Two of the trials were medical malpractice cases involving patients who died following complications during surgical procedures to insert dialysis catheters. The third involved a woman who claimed she had been permanently injured by scalding water at a Marietta restaurant.

The first was a four-day trial before Judge Alvin T. Wong in DeKalb State Court, during which the plaintiff's lawyers asked the jury to award $6 million in damages. Firm associate **David D. Mackenzie** assisted with this case.

The second was a three-day trial before Fulton State Court Judge Patsy Y. Porter after the plaintiff's $850,000 settlement demand was rejected. Firm associate **L. Evan Cline** assisted with this case.

The final trial, defended by Mr. Huff and Mr. Mackenzie, lasted two weeks before Cobb County State Court Judge Carl Bowers after settlement discussions and two mediation sessions failed.

Richard E. Glaze, a partner with *Balch & Bingham* in Atlanta, and colleagues from the firm's Birmingham office, recently won a defense verdict in a two week False Claims Act qui tam trial in the Northern District of Alabama, avoiding a potential multi-million dollar award to the United States, the relator and his attorneys. The claim alleged Balch's client had defrauded the United States in the performance of a contract between the client and the Department of Defense.

Wiley A. Wasden, III and **Travis D. Windsor**, partners with *Brennan Wasden & Painter's* Savannah office, obtained a defense verdict on behalf of their clients, a local cardiologist and his practice, after a five-day trial in May. The plaintiffs sued the defendants for injuries they alleged were related to treatment performed in 2009. Specifically, the plaintiff had a heart catheterization and stent placed in his left anterior descending artery to open up a blockage. The plaintiff was discharged on appropriate medications for his condition and instructed not to engage in strenuous activity for one week. Four days after the procedure, the plaintiff traveled to a rural piece of property and hiked 200 yards to a tripod deer stand. After climbing 20 feet to the top of the stand, the plaintiff became nauseous and faint. The plaintiff passed out and fell out of the stand resulting in a fracture of his T7/T8 vertebrae. As a result, the plaintiff is a complete paraplegic. The plaintiffs filed suit claiming that the defendants prescribed excessive hypertension medication, failed to warn of the side effects of the medication, and failed to give clear instructions on discharge for post-procedure activities. The defendants presented expert testimony that the medications prescribed to the plaintiff were indicated and necessary, that the warnings regarding the drugs were adequate, and that the plaintiff received clear instructions not to engage in strenuous activity for a week. The plaintiffs claimed special damages in the amount of $683,081.19 for past medicals and $1,800,029.00 to $2,184,097.00 for a life care plan. Prior to trial, the plaintiff made a demand of $1 million. At trial, the plaintiffs asked the jury for $7.4 million. The jury returned a verdict in favor of the defendants after approximately two hours of deliberation. This trial was recorded by the Courtroom View Network and is available for viewing at cvn.com.

State Bar President Patrise Perkins-Hooker (center) presented this year's award to Georgia Defense Lawyer *Editor-in-chief Sally Akins (left) and outgoing GDLA President Kirby Mason during the State Bar's Annual Meeting.*

GDLA Wins Bar's Best Newsletter Award Again

For the fifth consecutive year, the GDLA was honored by the State Bar of Georgia with the Best Newsletter Award for voluntary bar associations with more than 500 members.

The award is presented each year at the State Bar's Annual Meeting, held most recently at the Stone Mountain Marriott, June 18-21.

Winners are showcased in the State Bar's Annual Meeting brochure and the *Georgia Bar Journal*. This publicity has heightened the GDLA's visibility with both the bench and bar.

A five-time winning streak does not happen without significant time and effort. Kudos go to the countless contributing authors, which include GDLA members and sponsors, but especially to the newsletter Editors-in-Chief: Peter D. Muller of Goodman McGuffey Lindsey & Johnson in Savannah for 2011; Evelyn Fletcher Davis of Hawkins Parnell Thackston & Young in Atlanta for 2012; and Sarah B. (Sally) Akins of Ellis Painter Ratterree & Adams in Savannah for 2013, 2014 and 2015. Jeffrey S. Ward of Drew Eckl & Farnham in Brunswick has assumed the role now.

We also thank the 2014-2015 Editorial Board: Christopher L. Foreman of Watson Spence in Albany; Nicole C. Leet of Gray Rust St. Amand Moffett & Brieske in Atlanta; Megan Usher Manly of Ellis Painter Ratterree & Adams in Savannah; James Scarbrough of Mabry & McClelland in Atlanta; and R. Matthew Shoemaker of Swift Currie McGhee & Hiers in Atlanta. GDLA Executive Director Jennifer M. Davis is also to be commended for handling the layout/design, as well as writing, editing and photography for each issue. ❖

In April, **Frederick N. Gleaton** and **David Hayes** of *Owen Gleaton Egan Jones & Sweeney* in Atlanta won a defense verdict in a medical malpractice trial before Judge Patsy Y. Porter in the State Court of Fulton County. The jury returned a verdict in favor of the firm's client, a local orthopedic surgeon, in less than 20 minutes. The case involved a post-operative MRSA infection following revision of an earlier hip replacement. The plaintiff claimed total permanent physical disability and asked the jury to return a verdict between $3.5 and $5 million.

Vincent A. (Vince) Toreno, partner and chair of the Civil Litigation Practice Group at *Ken David & Associates* in Atlanta, recently obtained summary judgment on behalf of a Georgia university president and its board of regents, which were sued by a former athletic director alleging gender discrimination and retaliation in violation of Title VII.

The plaintiff, a longstanding university employee who had worked in various administrative positions, ultimately became the university's first permanent female athletic director. After approximately one and one-half years in that role she was terminated by the president, who decided the university needed an athletic director with more experience, leadership ability, and a track record of significant fund-raising. At the time, the University was on the cusp of being admitted to a Division I athletic conference and it was important that the athletic department and its director be up to the task.

The plaintiff was terminated but allowed to accept a newly-created position in another department at a lower salary. A male athletic director was hired as the plaintiff's replacement at a higher rate of pay. The plaintiff filed a claim of gender discrimination with the EEOC and claimed, thereafter, that her new position had been changed to a temporary position in retaliation for filing her claim. She then sued the university president and board of regents alleging gender discrimination and retaliation, as well as violation of the Equal Pay Act.

After the close of discovery, the defense moved for summary judgment, which was granted by U.S. District Court Judge Richard Story. The defendants argued that the plaintiff lacked the experience, education, and skills to be an effective leader of the athletic department and, further, had failed to raise significant funding for the department, a core responsibility of the position. Judge Story found that no reasonable jury would believe the president's non-discriminatory reasons for terminating the plaintiff were pretextual. Judge Story agreed the plaintiff failed to prove gender discrimination against women was the university's standard operating procedure because she failed to provide any statistical evidence in support, and the few anecdotes offered were inadequate to permit a reasonable jury to find in her favor.

The plaintiff's retaliation claim failed as well because she failed to establish the identity of the decision-maker who allegedly changed her new position from permanent to temporary. Finally, in response to the defendants' motion, the plaintiff abandoned her claim under the Equal Pay Act.

Troy Lance Greene and **Hugh B. McNatt**, partners at *McNatt Greene & Peterson* in Vidalia, tried a case in the State Court of Coweta County before Judge Seay Poulakos in February.

The plaintiff's vehicle was struck by a vehicle operated at a high rate of speed by an employee of an electrical utility; significant damage to both vehicles resulted. The plaintiff claimed a cervical disc injury as a result of the accident. Fault was admitted by the defendant-utility and the case proceeded on damages.

During the course of the case, several doctors were deposed by the defense. All were doctors selected by the plaintiff and not the defense. At least three orthopedic doctors testified the plaintiff suffered simply from degenerative problems and did not require surgery. The plaintiff was treated by a chiropractor, two pain specialists and three orthopedics before she finally located an orthopedic surgeon who performed a two-level fusion in 2014. The plaintiff had not worked since the accident and had over a $100,000 in medical alone.

The defense also secured the testimony of an independent orthopedic who testified the need for cervical surgery was not related to the car accident. The plaintiff's surgeon related the surgery to the accident. Mediation was unsuccessful and the plaintiff's final demand at mediation was for over a million dollars.

During trial the parties reached a settlement of $200,000. This was only $100,000 over the claimed medicals and was significantly less than the demand made at mediation. Local counsel was of the opinion that testimony from the original orthopedic doctors, along with what appeared to be a conservative jury, resulted in the plaintiff's settling her case for much less than she desired. It should be noted within a few weeks after this trial, a Newnan/Coweta jury rendered a verdict for over $2 million in a contested fault case with claimed medicals of only $89,000.

In June of 2015, **Jonathan Adelman**, a partner with *Waldon Adelman Castilla Hiestand & Prout* in Atlanta, obtained a winning jury verdict on behalf of an underinsured motorist carrier in a Cherokee County case. Plaintiff was a pedestrian when she was struck by a car in a parking lot. Following the accident, Plaintiff immediately sought treatment for knee pain and was diagnosed with a torn meniscus. Within two months after the accident, Plaintiff underwent arthroscopic knee surgery. Plaintiff's surgeon testified by way of video deposition at trial that the tear and surgery were due to the accident. Plaintiff's medical expenses were $30,000. The jury returned with a verdict in the amount of $27,000, which was offset to $0 as a result of the pre-trial settlement with the at-fault driver's liability carrier and the medical payment coverage benefits already paid. Prior to trial, Mr. Adelman's client had extended a settlement offer in the amount of $20,000. The pre-trial demand was $100,000.

After winning a 15-week medical-malpractice birth trauma trial in New Jersey, **John E. Hall, Jr.**, a partner in *Hall Booth Smith's* Atlanta office, won another such trial on June 19, 2015, on behalf of Baptist Health System, Inc. in Jasper, Walker County, Alabama.

Plaintiff's counsel, Lanny Vines, Ken Hooks and Tommy Carmichael, asked for $50 million in a case involving a now 11-year-old boy, Tyler Hall, diagnosed with cerebral palsy.

Plaintiffs alleged the hospital nurses should have advocated for a C-Section as early as 1:30 p.m., instead of waiting to call the obstetrician to labor and delivery (L&D) at 5:24 a.m. for a forceps delivery that occurred at 5:49 a.m. Tyler was born blue, floppy and without respiratory effort with a small, thin umbilical cord wrapped around his body. A neonatal nurse intubated him after spontaneous respiration failed. Air was heard around the breathing tube and Tyler was reintubated. When he was moved to the nursery, an emergency room doctor had to again insert the breathing tube, but after each effort and hyperventilation, Tyler's HB remained elevated and he pinked-up each time.

Plaintiff's L&D nurse expert, Dr. Michelle Murray, could not withstand cross-examination by Mr. Hall who used her own textbook definitions against her to describe the Fetal Monitoring Strip. Plaintiff's second nurse expert, Dr. Amy Jnah, NNP, denied ever advertising and was impeached with her own web page where she promoted an ability to "help you win your case!" Defense experts William Rhine, MD, a Stanford neonatologist, and L&D/neonatal nurse expert Sheryl Gauspohl provided credible, common sense testimony.

The defendant-obstetrician also obtained a defense verdict via their Alabama counsel. *Hall Booth Smith* partner **Jo A. Jagor** assisted in the many years of work-up on this case.

Nicole C. Leet of *Gray Rust St. Amand Moffett & Brieske* in Atlanta obtained a defense verdict for QuikTrip Corporation after a four-day jury trial in DeKalb Superior Court in a premises liability case. The case arose from a slip-and-fall on alleged ice outside the store; both liability and damages were disputed.

Timothy J. Buckley III and **Taylor W. Hensel** of *Buckley Christopher & Haff* in Atlanta successfully defended a case in Butts County on behalf of Sheriff Gary Long and the Association County Commissioners of Georgia. The plaintiff claimed severe and disabling injuries including two spinal surgeries and total disability from work. The pretrial demand was $1,000,000; the defense offered $25,000 to settle the case. The jury returned a defense verdict after deliberating for less than 30 minutes. ❖

President's Message

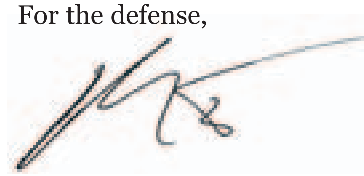
Continued from page 3

newsletter offers updates on practice areas, precedential cases and more; and monitoring the various GDLA e-blasts keeps your finger on the pulse of the defense practice. That said, both examples are outlets for your contribution, too.

It is time to broadly spread the message that the GDLA exists for the improvement and advancement of civil defense lawyers individually and the defense bar collectively. In recent years, we have made great strides toward increasing our visibility and voice before the bench and bar. I expect to expand and enhance our reputation and reach by working with each of you.

It is time to show everyone that we are the best civil defense lawyers in Georgia. We are the GDLA.

For the defense,



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

In Memoriam: Eugene Gartly Partain
GDLA Past President

"Mr. Partain would have you believe . . ." were the words that often signaled many a plaintiff lawyer's descent into disaster. By pursuing such an ill-advised course, the lawyer had chosen to make the trial about Eugene Gartly Partain instead of about his client, and that choice was almost always the inevitable and certain path to defeat.

I heard those words many times over the years as I tried cases with my mentor and friend, Gene Partain. I was there for the many victories that followed. The explanation for Gene's success was simple; Gene was the most prepared trial lawyer I ever saw in a courtroom. He also insisted that those with whom he worked display the same level of preparation. Weeks before the calendar call of a case, Gene would require that I draft not just one potential response on the cross of an adverse witness, but all possible responses and then a response to that response.

I have never met a more focused person than Gene Partain in the courtroom. Trying a case with Gene was like mortal combat. All distractions, considerations and normal events of everyday life were excluded except the relentless march to verdict.

Following is a biographical tribute written by Paul J. Murphy, Gene's son-in-law. Gene and Paul worked together as partner and associate at Powell Goldstein and then later as partners at King & Spalding.

Gene led our organization as President from 1982-1983. Although I think the GDLA does much to keep the trial lawyer alive, we will not see the likes of a Gene Partain again.

—Robert M. Travis, Bryan Cave
GDLA President 2007-2008

Eugene Gartly (Gene) Partain
1930-2015

Gene Partain was born and grew up in the railroad town of Paragould, Arkansas during the depression.

Gene completed his rigorous studies at Western Military in St. Louis, physically steeled, mentally disciplined and intellectually prepared. He enrolled at Duke University, where he was an outstanding student in the ROTC program.

After Duke, Gene received his commission as a Lieutenant in the U.S. Air Force, a time when the U.S. was embroiled in the Korean conflict. He earned a position in a Special Forces unit and deployed to Asia for the next year. Gene had always had a reputation as an elegant speaker. It was during his tour that he learned advocacy came naturally to him. Without the benefit of legal training, he acted as counsel in over 100 successful court martials. Gene's life in the law had begun.

After he was discharged from the military, Gene earned his Master's Degree at Northwestern University. Soon thereafter, he returned to Duke to attend law school where he made his mark in moot court competitions and in evidence and advocacy classes. He graduated and took an associate position with Powell Goldstein Frazer & Murphy (now Bryan Cave).

Gene cut his teeth doing insurance defense, representing State Farm and others in some of their most difficult cases. He became a partner in the firm after four years.

It was the Golden Age for trial lawyers in the Southeast, and Powell Goldstein solidified its place as one of the top litigation firms in the legal firmament, a place where Gene was counted among the legendary trial lawyers such as GDLA Past President Frank Love, Jr., John Marshall, Bob Patrick and Ed Dorsey.

The importance and complexity of Gene's cases grew along with his reputation for unparalleled litigation skills and unblemished record for victories in the courtroom, trying well over 300 cases to a verdict with hardly ever a setback. (Even his two rare setbacks were reversed on appeal.) Soon, Gene was appearing in trial and appellate courts across the country, representing clients in truly "bet the company litigation."

Among other landmark trials, Gene represented Judy Blalock when she took on the LPGA for antitrust violations, Delta Airlines when its pilot's mandatory retirement program was challenged, and Hercules Corporation in the dioxin litigation. He was fearless inside and outside the courtroom, never backing down in a fair fight or even when the odds were heavily stacked against him.

Gene was accorded all sorts of honors for his skills in the courtroom, including membership in the American College of Trial Lawyers and in "Best Lawyers in America." He was also honored in the American Bar Association's magazine as one of the top litigators in America. He served as GDLA President from 1982-1983.

While he always seemed to be in the spotlight, Gene was always about teamwork, creating an esprit de corps with his team and sharing opportunities for others to shine, as well.

We take solace that our sense of loss will be replaced by the warmest and happiest memories of this magnificent man.

—Paul J. Murphy ❖

Welcome New GDLA Members

The following have been admitted to membership in the GDLA since the last edition of the newsletter.

W. Bruce Barrickman
Barrickman Allred & Young, Atlanta

Audrey Kohn Berland
Huff Powell & Bailey, Atlanta

Michael Boorman
Huff Powell & Bailey, Atlanta

Andrew Joseph Brandt
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Sherrill N. Britt
Drew Eckl & Farnham, Atlanta

Christopher Bruce
Speed Seta Martin & Trivett, Lawrenceville

Hilliard V. Castilla
Waldon Adelman Castilla Hiestand & Prout, Atlanta

L. Evan Cline
Huff Powell & Bailey, Atlanta

Stephen James Cohen
Smith Moore Leatherwood, Atlanta

Christopher A. Cosper
Hull Barrett, Augusta

Jaime E. Davis
King & Spalding, Atlanta

Brandon G. Day
Hanks Brookes, Atlanta

Erin Easley
Goodman McGuffey Lindsey & Johnson, Atlanta

Austin A. Evans
King & Spalding, Atlanta

Daedrea De'Nae Fenwick
City of Atlanta Department of Law, Atlanta

Brittany Fleming
Hicks Casey & Morton, Marietta

Phillip E. Friduss
Hall Booth Smith, Atlanta

David Glustrom
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Sarah Marie Good
Bryan Cave, Atlanta

Scott R. Grubman
Chilivis Cochran Larkins & Bever, Atlanta

Gwendolyn D. Havlik
Drew Eckl & Farnham, Atlanta

Elissa Haynes
Goodman McGuffey Lindsey & Johnson, Atlanta

Heather M. Howard
King & Spalding, Atlanta

Julye Johns
Huff Powell & Bailey, Atlanta

Rachel Keller
Broughton Firm, Atlanta

Jeffrey Kershaw
Gilson Athans, Atlanta

Kenneth Alexander Khoury
Balch & Bingham, Atlanta

Clayton Knowles
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Margaret Dasher Louttit
Tisinger Vance, Carrollton

David Mackenzie
Huff Powell & Bailey, Atlanta

Robert Marcovitch
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Crystal McElrath
Swift Currie McGhee & Hiers, Atlanta

Jamala McFadden
Employment Law Solution, Atlanta

E. Alan Miller
E. Alan Miller, P.C., Atlanta

Lorrin Elizabeth Mortimer
Downey & Cleveland, Marietta

Alycen A. Moss
Cozen O'Connor, Atlanta

Trevor P. Newberry
Huff Powell & Bailey, Atlanta

Kristy G. Offitt
Ogletree Deakins Nash Smoak & Stewart, Atlanta

Tara W. Parker
Downey & Cleveland, Marietta

Erica L. Parsons
Lueder Larkin & Hunter, Atlanta

Tina Michelle Piper
Nall & Miller, Atlanta

Thomas O. Rainey, IV
Cruser & Mitchell, Norcross

Anderson D. Robinson
Brown & Adams, Columbus

Michelle Alameda Sherman
Mozley Finlayson & Loggins, Atlanta

Kyle Evans Smith
Drew Eckl & Farnham, Atlanta

Warren K. Sponsler
Sponsler Bishop Koren & Hammer, Atlanta

Emaly Standridge
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Raquel Stokes
Thomas Kennedy Sampson & Tompkins, Atlanta

Kevin Stone
Freeman Mathis & Gary, Atlanta

Claire Sumner
Carlock Copeland & Stair, Atlanta

M. Waite Thomas
Drew Eckl & Farnham, Brunswick

Vincent A. Toreno
Ken David & Associates, Atlanta

Mary Dickinson Trammell
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Sara Deskins Tucker
Greenberg Traurig, Atlanta

Kyle Waddell
Fulcher Hagler, Augusta

Jane Natalie Wilkes
Sharon Ware & Associates, Atlanta

Travis D. Windsor
Brennan Wasden & Painter, Savannah

J. Timothy Wooten
Gower Wooten & Darneille, Atlanta

Changes to GDLA Membership Application Process Take Effect

Several changes that impact a prospective member's application for GDLA membership have taken effect. Below is a summary of each:

Free Year Memberships for DRI and MBLC Members

The GDLA Board of Directors, at the recommendation of the Strategic Planning Committee, voted during its 2015 Spring Meeting to offer complimentary one-year memberships to two groups; the applicant must meet the eligibility requirements and cannot have been a GDLA member within the past five years.

The first group, DRI, is our counterpart on the national level. In fact, the GDLA is considered a DRI affiliate as one of its State and Local Defense Organizations (SLDOs). DRI members who are not GDLA members have been e-mailed about the offer, and several have joined.

The second group qualifies any civil defense lawyer who is a current member of a bar association that is part of the Multi-Bar Leadership Council (MBLC). The MBLC, of which the GDLA is a member, was founded in September 2001 by then-Atlanta Bar Association President Seth Kirschenbaum. The purpose of the MBLC is to foster and improve relationships among the members of local bar associations, including diverse bars and metro bars. Our hope is to enhance our diversity through this effort.

Eligible MBLC organizations are: Atlanta Bar Association, Cobb County Bar Association, DeKalb Bar Association, DeKalb Lawyers Association, Gate City Bar Association, Georgia Asian Pacific American Bar Association, Georgia Association for Women Lawyers, Georgia Association of Black Women Attorneys, Georgia Hispanic Bar Association, Gwinnett County Bar Association, North Fulton Bar Association, Sandy Springs Bar Association, South Asian Bar Association of Georgia, and Stonewall Bar Association.

Membership Application Fee Eliminated

Also during its 2015 Spring Meeting in April, the Board approved eliminating the $100 application fee that had been required for membership applicants in practice for six years or more. The Board felt the fee might be perceived as a deterrent to joining the GDLA.

Bylaw Amendment Expedites Membership Approval Process

During its 2014 Fall Meeting, the Board unanimously approved proposed amendments to the Bylaws regarding the membership admissions process. The goal was to expedite the process so prospective members do not have to wait for the Board to confer and vote at its quarterly meetings.

Bylaw changes must be approved during an Annual Meeting, so those members present at the Business Meeting on June 13, 2015, at Hammock Beach Resort voted and approved it.

This change will allow new members to more immediately reap the benefits of GDLA membership. The revised language shown below is underlined; deleted language is stricken through:

> Article III. Membership. Section 4. Applicant for Membership. Any lawyer eligible for membership may submit his or her name and qualifications in writing to the Admission Committee Chair~~man~~<u>person</u>, who shall promptly refer such nomination to the ~~Membership~~ <u>Admissions</u> Committee for investigation and report. The Admissions Committee shall inquire into the character and the professional standing and qualifications of the applicant and shall report its findings and recommendations as soon as practicable <u>by e-mail</u> to the Board of Directors <u>for comment</u>. ~~Following the filing of the Admission Committee's report and recommendations with the Board of Directors at a regularly scheduled Board Meeting, the Board of Directors shall vote by ballot upon such nomination.~~ <u>After one week, the Executive Committee shall vote on the nominated member at its next meeting or by e-mail.</u> Two (2) unfavorable ballots shall be sufficient to reject the applicant. If the ballot be favorable, the President <u>or Executive Director</u> shall extend promptly to the applicant an invitation to membership in this Association. <u>In special cases where the Admissions Committee and/or Executive Committee are unable to confirm a prospective member's practice as being "primarily for the defense," the prospective member's application may be reviewed by the Board of Directors for a vote at its next regularly scheduled meeting or by e-mail.</u> ❖

Members are encouraged to recruit their colleagues to join the GDLA.

We've crossed the 800-member mark and continue to expand the voice of Georgia's defense bar.

Our membership application is now online; prospects can visit the Membership tab at **www.gdla.org.**

Visit Find a Defense Lawyer there to see if someone is already a member.

Georgia Supreme Court Issues Apportionment Opinion:

Clarifies and Reaffirms Defendants' Right to Apportion Fault to Nonparties in Tort Suits

By Martin A. Levinson
Amicus Committee Chair
Hawkins Parnell Thackston & Young, Atlanta

The Supreme Court of Georgia issued an important opinion on July 6, 2015, on the topic of apportionment of fault to nonparties under Georgia's apportionment statute, O.C.G.A. § 51-12-33.

The case of *Zaldivar v. Prickett*, Case no. S14G1778, 2015 Ga. LEXIS 547, involved an automobile collision in which the plaintiff was driving a truck provided to him by his employer. There was conflicting testimony in the case as to whether the defendant ran a red light or whether the plaintiff failed to yield to oncoming traffic.

The defendant filed a notice of intent to seek nonparty apportionment to the plaintiff's employer pursuant to O.C.G.A. § 51-12-33(c) under a theory of negligent entrustment. The plaintiff's employer apparently had received three relatively serious complaints about the plaintiff's bad driving in the course of his employment for the employer during the roughly 10 years prior to the accident. The plaintiff moved to preclude the defendant from seeking to apportion fault to the plaintiff's employer, and the trial court granted the plaintiff's motion.

On appeal, the plaintiff asserted numerous broad arguments against allowing apportionment to the plaintiff's nonparty employer. The Georgia Trial Lawyers Association (GTLA) filed an *amicus* brief in the Court of Appeals decrying the potential impact of nonparty apportionment not only in this case, but also in future cases, and seeking a ruling that would greatly limit the applicability of nonparty fault in tort cases in Georgia.

The Court of Appeals affirmed the trial court's judgment, relying primarily on its own decision in *Ridgeway v. Whisman*, 210 Ga. App. 169 (1993), in which the Court of Appeals had held that negligent entrustment of a motor vehicle or other instrumentality cannot be a proximate cause of a subsequent injury to a person entrusted with the vehicle. In both *Ridgeway* and the appeal in this case, the Court of Appeals held that under those circumstances, the entrustee's own negligence "breaks the causal chain" and renders it impossible for the entrustee to recover in tort against the entrustor. The Court of Appeals reasoned that since the plaintiff in this case could not have brought the claim against his own employer, the defendant also was barred from seeking to apportion fault to the plaintiff's employer under O.C.G.A. § 51-12-33(c).

The defendant petitioned for *certiorari* to the Supreme Court of Georgia, which was accepted, and the defendant solicited the GDLA's assistance. In its *amicus* brief, the GDLA argued that the Court of Appeals had erred in deciding whether the defendant could seek apportionment of fault to a nonparty based on whether the plaintiff could assert a claim against the nonparty. More fundamentally, the GDLA contended and explained that O.C.G.A. § 51-12-33(c) specifically permits apportionment of fault to any nonparty who contributed to the plaintiff's claimed injury or damages, regardless of whether the plaintiff could have sued that person or entity.

Contrary to what the plaintiff and the GTLA contended in the courts below, the plain statutory language of O.C.G.A. § 51-12-33(c) does not limit nonparty apportionment to situations where the nonparty could not be named for some jurisdictional or similar reason. The GDLA also questioned the validity of the *Ridgeway* case, in particular, as applied to the context of nonparty apportionment.

In an opinion issued on July 6, 2015, and revised on July 27, 2015, the Supreme Court of Georgia reversed the decisions of the Court of Appeals and the trial court below. In rendering its opinion in *Zaldivar*, the Supreme Court accepted the invitation to make some broad pronouncements regarding when a nonparty's conduct can be said to have "contributed to" the plaintiff's claimed injuries and damages as required under O.C.G.A. § 51-12-33(c) for apportionment of fault to the nonparty. Although the Supreme Court's opinion initially was unanimous, a substitute opinion was issued on July 27, 2015, in which six of the seven Justices concurred (with Justice Benham as the lone dissenter).

The Supreme Court first addressed an argument that had been regularly made by plaintiffs since the Court's decision in *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359 (2012). The specific argument, which was also made by the GTLA in its own *amicus* brief in the Court of Appeals in *Zaldivar*, essentially was that the word "fault" in O.C.G.A. § 51-12-33(c) is synonymous with "liability," with the result that a defendant would be permitted to seek apportionment against a nonparty only in those instances where the nonparty could be held liable to the plaintiff. Such an interpretation would have eviscerated nonparty apportionment in that it could be used to prevent a defendant to apportion fault to a nonparty in any situation in which the plaintiff could not bring a lawsuit against the nonparty.

The Supreme Court expressly and soundly rejected that argument in *Zaldivar*:

> To the extent that *Couch* has been understood to suggest

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Personal Liability of Property Managers in Negligent Security Cases

By Jacob E. Daly
Freeman Mathis & Gary, Atlanta

In a typical negligent security case—for example, a case arising out of an assault of a tenant in the parking lot of an apartment complex—the plaintiff usually sues the owner of the property, as well as the management company. As the owner and an occupier of the premises, respectively, both are proper defendants under O.C.G.A. § 51-3-1. Occasionally, the plaintiff also sues an employee of the management company, such as the on-site property manager, for strategic reasons. The property manager is likely to be a citizen of Georgia, so suing that person could prevent removal to federal court even if the owner and the management company are citizens of other states. Also, the property manager may reside in a county that would be a more favorable venue for the plaintiff than the county or counties where the owner and the management company reside or where the apartment complex is located. But just because there are strategic reasons for suing the property manager does not necessarily mean doing so is permissible pursuant to O.C.G.A. § 51-3-1. This begs the question whether a property manager who does not own the premises can be sued in her personal capacity as an occupier of the premises.

The Georgia appellate courts have issued inconsistent opinions on this question. In a lawsuit arising out of the Centennial Olympic Park bombing, the Supreme Court of Georgia held that the director of security for Atlanta Committee for Olympic Games, Inc. (ACOG) was not liable under any premises liability theory because he was not an owner or an occupier of the premises.[1] Similarly, the Court of Appeals has held that the manager of a department store was not liable for injuries sustained by a customer in a slip-and-fall incident because she was not an owner or an occupier of the store.[2] In an earlier case, however, the Court of Appeals had held that "person[s] in charge of the premises," which in that case included the superintendent, foreman, manager, and assistant manager of an oil mill, are considered "occupiers" to whom O.C.G.A. § 51-3-1 applies.[3] Subsequent decisions by the Georgia Court of Appeals have defined "occupier" as one who exercises control over the premises,[4] and such a broad definition would seemingly include a property manager since people in that position usually are responsible for supervising the day-to-day operations of the premises.

In reliance on these inconsistent decisions and this broad definition, several federal judges in Georgia have remanded cases involving a non-diverse managerial employee because the uncertainty as to whether a managerial employee can be liable under O.C.G.A. § 51-3-1 precluded a finding of fraudulent joinder.[5] Because of the high standard required to show fraudulent joinder, these federal judges correctly remanded these cases. In the context of a removal based on fraudulent joinder, it was not the courts' place to decide whether a managerial employee can be liable under O.C.G.A. § 51-3-1. Judge Clay Land recognized the importance of the procedural posture in making this decision when he noted that "the Court hastens to add that if it were deciding the issue *de novo* in another case in a different procedural posture, it may decide the issue differently."[6]

Because there are inconsistent decisions on this issue, a *de novo* analysis is necessary. Determining ownership of property is easy, but determining whether a person or an entity occupies the property is difficult because O.C.G.A. § 51-3-1 does not supply a definition of "occupier" and the dictionary definitions are no less vague than the definition adopted by the Georgia Court of Appeals. For example, *Black's Law Dictionary* defines "occupant," which it equates with "occupier," as "[s]omeone who has

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Mediation 101: Why the Mediator Can Be the Most Important Instrument in Your Utility Belt

By Gregory J. Parent
Team Leader, Miles Mediation & Arbitration Services

Introduction

Mediation is here to stay. It is as accepted in civil litigation as discovery, depositions and trial. More importantly, mediation is the most expedient and efficient medium for getting cases resolved, both pre-suit and at every stage of litigation, leading up to and including the eve of trial.

In the last five years, mediation has exploded in popularity and attorneys on both sides have embraced its effectiveness. Although the litigants may not always agree on the value of a case, attorneys and claims professionals universally agree that mediation provides an excellent forum for exhausting settlement negotiations, while minimizing risk, saving litigation expenses, and expediting the resolution of cases that should settle before preparing for trial.

It is never a sign of weakness or a loss of bargaining power to suggest mediation to the other side in a case, whether it's pre-suit or in the fifth month of discovery. Setting aside a handful of practical limitations to a successful mediation, such as instances where it has been determined that no money will ever be offered before a verdict is rendered, mediation should almost always be considered.

There are some core tenets in every mediation that defense professionals and counsel should consider in evaluating mediation from the ground up, whether the amount in controversy is $5,000 or $5,000,000. Those considerations include understanding and making demands of your mediator, appreciating nuanced subtleties of negotiations, and having your theory of the case peer-reviewed by the mediator through discussion of your trial strategy.

What Makes A Good Mediator and What Should You Expect

A good mediator is someone whose legal knowledge is matched in equal parts by his or her relevant experience and emotional intelligence. They are great listeners and exceptional conversationalists.

A good mediator is like a late night talk show host, not only capable of delivering a five-minute monologue to disarm and engage a room full of anxious strangers, but also capable of being solicitous enough to get others to talk about themselves in a strategic manner.

A good mediator is the point guard on the court, skilled enough to make others play well together and look good, without ego, but confident and skilled enough to take charge if no one else is grabbing the ball.

Mediators have very limited control during a mediation. They can only control the "process" of a mediation. They cannot control the decision-making of the plaintiff. They cannot control the purse strings of the claims adjuster or the corporate client. They cannot control any of the facts of the case.

A good mediator may offer valuable insight regarding the temperature of the parties during the day, information about their own perceptions of the case as it is being presented, and thoughts about the merits of the facts and the parties involved.

Strong mediators are like your best friend, your favorite bartender, and your favorite former professor all wrapped into one. They know you but, more importantly, they intuitively understand what you need to accomplish before you even arrive. Think of your mediator like a Sherpa climbing Mt. Everest; someone who is able to help with your ascent by being ready and willing to do all of the heavy lifting.

You need to work with your mediator to best maximize their skill set and "value added" so that you can get the most out of a mediation. Sometimes the rapport you develop with a mediator grows organically over time; a level of trust and reliance that is earned through working together on multiple occasions.

There are certain variables that you can employ—even on your very first mediation with a specific mediator—to ensure that you put yourself and your client in the best possible position to succeed. A mediator should be regarded as an instrument in your utility belt at mediation. Using the same care and discipline you would in preparing for an expert deposition or crafting your closing arguments for trial, you should put thought into whom you select to mediate your case and how you choose to utilize the mediator's strengths and intangibles.

A strong mediator will never hesitate to tell you the things you *need* to hear about your case. There is no better vehicle for displaying to a client that you are well prepared and serious about making mediation work for you than to engage a strong mediator to help you deconstruct your case to find the weak points. At best, another set of eyes helps you to see something you may have missed. At worst, you get to distinguish for your client why a counter-argument raised by the mediator is not relevant to your analysis and theory of the case.

A good mediator is never going to intentionally try to upstage you when you solicit his or her advice. They are not going to make you look bad in front of your client or an adjuster. If anything, they will suggest things to clue you in as to what might make a good move and, wherever possible, they are going to give you credit and defer to you when it comes to garnering any accolades for negotiating strategies that yield good results or are viewed as being particularly effective.

In an ideal world, you want to make sure you know the file before a mediation so that you can best help your client avoid over-paying a claim. Know the facts, know the law, and know your opponent's weak points. Often the defense has done a more exhaustive review of a plaintiff's medical history, such that they are armed with more information than the plaintiff's own attorney.

Occasionally, however, you are called upon to pinch hit for a colleague and cover a mediation on a file that you have not worked up and may not have even had an opportunity to review. In such situations, RELY ON YOUR MEDIATOR. Don't be shy, don't be embarrassed, and don't be overly prideful. Everyone has been there and in today's legal market, folks are changing jobs all the time, so it's more common than not to have cases where multiple attorneys have been involved at some point or another.

Pull the mediator aside and let them know what's going on and signal that you will need their help on gathering even the most basic information about a file. Rather than peppering you with basic questions about the case to get a thumbnail sketch of what is going on, a good mediator will instead go seek that information from the plaintiff's room. Moreover, they will know to be especially inquisitive so as to be able to inform you of the lay of the land by providing you with relevant information that you might have otherwise already known if you were not new to the file.

Furthermore, a good mediator is going to come back to you and talk about the pertinent and relevant facts in a matter-of-fact tone, which your client will feel is revealing the mediator's command of the material. In reality, the informative session will be a quick *Cliff's Notes* update for you to get brought up to speed.

Understanding the Nuances and Subtleties of Mediation

On its surface, the mediation process is very simple. There is usually an opening session where the parties give opening statements and everyone gets to make an introduction. Beyond that, everything about mediation is nuanced, with many underlying complexities and subtleties. Here are some pointers to consider in every mediation:

(1) Plaintiff's counsel may need to grandstand for their client during the opening, portraying a side of their personality that seems counter to the kind and collegial adversary with whom you had been working the past few months. He or she has an audience at mediation and may feel a certain need to entertain. Don't take it personally.

(2) Walk a mile in the plaintiff's shoes. Have some empathy and compassion. Even if every one of your other cases involves a lying, cheating and malingering opportunist, please entertain the thought that the plaintiff at this particular mediation may not necessarily be insincere or dishonest just because they want more money than you requested in your evaluation.

Additionally, while this may be your 115th mediation, it is likely the plaintiff's first. So be patient as they get acclimated to the reality that you are not going to present them with a blank check. No one wants to wait til 5:00 p.m. to start negotiating in earnest, but be cognizant that the plaintiff is having their reality checked throughout the day and may need time to adjust to the fact they are not going to realize as much of a recovery as they may have initially hoped.

(3) The plaintiff should not have to pay for the sins of his or her attorney. If you have been doing litigation long enough, chances are you will circle around to face an attorney on the other side of the table at mediation who has crossed you in the past and left a bitter taste in your mouth. Your disdain may be palpable, warranted and even validated by the mediator. But don't take out your personal frustrations on this particular plaintiff if he or she has done nothing wrong in this case. You have to judge and evaluate the plaintiff on the merits of the case before you, and not the person representing them—especially where opposing counsel has a demonstrated history of being a jerk.

(4) Consider transparency. No one likes being surprised at mediation. The cardinal sin for a plaintiff's attorney to commit is showing up to the mediation with new, undisclosed medical expenses, with the expectation that they will be considered for purposes of settlement negotiations. Defense attorneys do not usually err in that manner. In cases where defense counsel may see things differently than his or her client, however, consider sharing that information through the mediator.

No one has to be thrown under the bus, but at the very least you can signal, through the mediator, that you are having difficulty getting authority you feel may be warranted. It is common for plaintiff's attorneys to confide in the mediator or share outright that they are having "client control issues." There is no reason not to consider the same transparent courtesy when the same is true for a defense attorney.

(5) Negotiate consistently. There are times when you have more than enough money to get a case settled and there is precious little you could do to keep a case from settling. Other times, your settlement authority may be so thin that you have no wiggle room and each offer must convey a very specific message. Plaintiffs get frustrated with negotiations that are inconsistent and arbitrary. Consider articulating reasons for your moves. The other side may not agree, but they may, at the very least, appreciate that you had some thought behind the moves. Cutesy moves or reactionary moves can bog down otherwise productive negotiations. Even if you do not authorize the mediator to share your reasoning, consider discussing with your mediator his or her thoughts on how to get the most bang for your buck. While you may feel stumped by limiting circumstances that seem daunting, a good mediator has seen enough different scenarios to give you some perspective and guidance.

(6) Brackets can be your friends. There are folks who believe that brackets are equal parts voodoo and AP Calculus and the mere mention of the word makes their heads hurt. Before becoming a full-time mediator, I shared in that view; but no more. Brackets, in many circumstances, can be instrumental in breaking up a logjam of negotiations that is going nowhere fast.

Mediation is about learning new information and sending new information with every offer and demand. Sometimes those important messages are misinterpreted or ignored altogether. Occasionally, one party can effectively hold the other side "hostage" by their negotiation strategy, especially where they appear to be dragging the process out with slow or counterproductive moves.

Brackets can expedite the process and give specific information from the safe confines of an official bargaining position without having to officially commit to anything. Even if brackets did not operate as a way to expedite the process, they would still be valuable because they provide the mediator with one very important piece of information—whether the negotiations are going to be fruitful.

A good mediator likes to have an understanding about midway through a mediation of whether the parties, posturing and strategy aside, are working toward a compromise or an impasse. Brackets often provide some additional insight which can serve to give clarity to the entire mediation process. Put another way, if you could know with certainty at 1:00 p.m. that your case is going to impasse, why spend an additional five hours working toward that certain conclusion. Brackets sometimes reveal that the parties, despite their best efforts and best intentions, are so far apart that no chance of compromise is ever going to be realistic. In those situations, brackets can be both time and cost savers.

Peer Reviewing Your Case with the Mediator

That last element of an effective mediation is taking a dry run at presenting your case. Often, the only real "audience" in presenting the defense side of a case is the mediator. For any number of reasons, defense counsel may not want to show all of his or her cards to opposing counsel, either in the opening or at any point throughout a mediation. Revealing your trial strategy to a good mediator, however, is akin to a doctor getting a medical journal paper peer-reviewed. Not every defense attorney gets to "round table" his case with colleagues or multiple levels of claims professionals. In those cases, trust your mediator and solicit his or her critical thoughts.

No one wants to go to trial and get embarrassed in a court of law because they were not prepared or they did not test their theory of the case as completely as possible. A mediator can be effective at playing the *devil's advocate* role when helping you to evaluate your case. If you are confident enough in your case, sharing it with a mediator in caucus won't hurt you. If you are not that confident in your theory of the case, sharing it can only highlight the deficiencies in the case and lead to a productive discussion about how you might work to improve the problem areas. In some situations, such enlightened discussion may lead to the realization that a case merits consideration of more settlement authority.

In some situations, however, there is absolutely no concern about weaknesses in the defense's case, rather there is a smoking gun that would cripple the plaintiff's case. In such situations, consider sharing the information with your mediator.

A good mediator knows the power of such information. Moreover, he or she knows that the opponent in the other room is equal parts lawyer and businessman. No one wants to go to trial to get their teeth kicked in with the sudden discovery of damaging or case-killing information. If the proverbial "smoking gun" is of a nature that cannot change with disclosure to the plaintiff, there is no harm in sharing it at mediation. While every litigator relishes the notion of a theatrical Hollywood moment where you impeach someone with a case-killing revelation, the practical theater of that reveal is best deployed during a mediation.

There is one final practical consideration of mediation that is nuanced but relevant for all participants. The State Bar is relatively small. While you can never settle one claim at the expense of or in consideration of another claim, your legal career can span decades. Over the course of time, you will see the same folks again and again. Be respectful of your opponents. Vent and complain to a mediator. A good one will gladly let you get your frustrations off of your chest. But allow the mediator to talk you in off the ledge and encourage you to take the high road and govern yourself in a more disciplined manner.

In other words, let your mediator help you keep your cool and keep a good perspective. This is business. It's not personal. Keep it respectful and be professional. Let your mediator do the heavy lifting. ❖

Gregory J. Parent is a mediator and Team Leader with Miles Mediation & Arbitration Services, a GDLA Platinum Sponsor. His unique philosophy regarding mediation is predicated on having been in every professional's seat in the room. He has been a claims adjuster at State Farm, a defense attorney with then-Hawkins & Parnell and Dennis Corey Porter & Smith, in-house with Zurich and Liberty Mutual, and a plaintiff's lawyer.

Visualization: The Science of Seeing the Facts

By Chuck Fox, Ph.D.
Engineering Systems, Inc. (ESI)

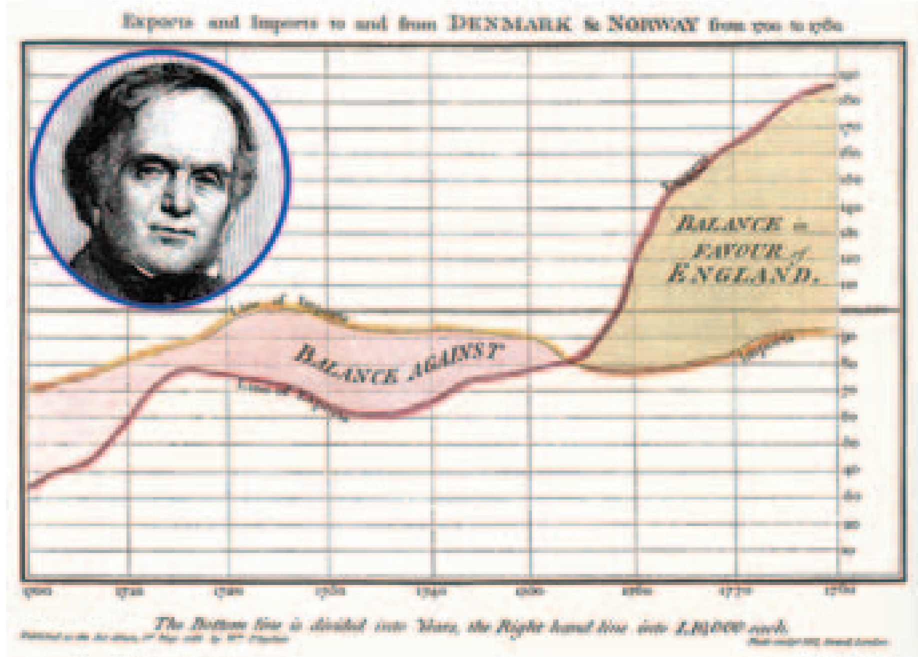


***Figure 1:* William Playfair's famous 1786 rendering of a line graph showing England's imports and exports to and from Denmark and Norway. Note how easily the viewer can see when England is importing more than it exports and when England begins exporting more than it imports.**

In the last few decades, we have witnessed dramatic changes to the tools and technologies employed to identify facts and communicate findings. These changes have shifted the focus to bridging the gap between the two—pairing our ability to analyze scientific facts in a case with the ability to communicate those complex facts to stakeholders and fact finders.

Connecting to Your Audience

It is important to use the best tools available when investigating a case. Expert testimony often provides the guideposts that lead to a meaningful verdict, but there is a challenge—how do you convey that information accurately and completely, in terms that a non-technical audience of stakeholders, judges, and juries can understand? Compelling visuals can be a powerful way to connect non-technical stakeholders and fact finders to the often cumbersome and complex facts in technical litigation.

A Shifting Technology Landscape

Traditionally, the high cost of creating visualizations meant that it was reserved for high-stakes litigation. With the advent of new technologies and lower cost options for creating high quality visualizations, we are now seeing these important tools move into the earliest stages of a dispute. Scientific visualization methods can change the course of a case long before it goes to trial, by crystallizing and unifying the legal team's understanding of the facts early on in a complex case. A clear understanding of the facts by all team members, including non-technical members, clarifies case theories and ultimately helps jurors and/or judges clearly understand the facts behind arguments that are critical to prevailing in litigation.

A Visualization History

What kind of technology is needed to create visuals that communicate so broadly and clearly? Many would refer to computer technology as the catalyst for modern scientific communication, and it is true that these tools have advanced our visualization capabilities dramatically. However, to truly understand the value of strong visualizations, it's helpful to look back at the history of visual communications.

William Playfair was a Scotsman in the late 1700s, also known as the age of reason. Playfair enjoyed many careers, each enhancing his insight into modern thinking. Perhaps his most significant contribution was in the area of data visualization, where he has been credited with inventing the line graph, the bar graph, and the pie chart. Today, we take these data visualization tools for granted. They are a de facto standard in how we use Microsoft Excel and other spreadsheet applications to display our data. But Playfair's insight changed the way people consume data. Representing the data pictorially allows people to more deeply and more easily understand and share complex data with others.

Today, the same notion applies, but our ability to convert raw data into compelling pictures is more powerful than ever before—extending into 3D animations, virtual reality, and 3D printing. We are no longer limited by static images depicted along a single plane. We now have the ability to show data in a way that is even more consumable—in a way that mirrors how people observe it in real life. The data sets are simply larger that the ones William Playfair depicted!

Visuals can influence and inform, and we use them to better understand the world around us. We use maps to navigate cities, and advertisements when making decisions about the latest and greatest products. Unlike advertisements, the graphics used to demonstrate technical concepts in the courtroom must be accurate. They must be on-point, informative and consistent with the laws of science. The tools now available to modern animators enables the creation of extraordinarily accurate and impressive depictions.

However, the volume and complexity of the data introduces new challenges, and it is vital that the animation team have the experience and expertise needed to convert the data into information that can be efficiently understood by the viewer.

Visualizations in Action

Realistic 3D Renderings

In one case, a Tier 1 supplier of automotive components, was sued for allegedly infringing on a patent involving adjustable accelerator pedal systems supplied to several major automotive manufacturers. The supplier denied infringement and challenged the validity of the patent claims. Animations were developed to show the structure and operation of diagrams included in the patent filing, and illustrate how the asserted patent claims were broadly and abstractly worded. An expert testified to the technical accuracy of the animations, and the judge allowed them to be introduced as evidence into a motion for summary judgment.

Based on the evidence at hand, the plaintiff abandoned its claims on the pedal systems supplied to two of the manufacturers, and the motion for summary judgment on the remaining patent infringements was granted. The decision was appealed and the case eventually reached the state's supreme court, and the engineering visualizations were used in helping to drive a unanimous decision.

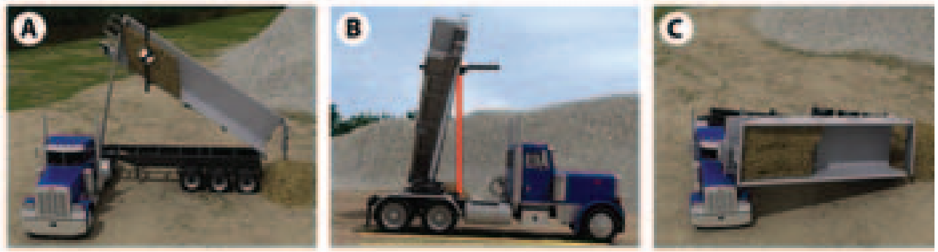


Figure 3: Articulated dump truck accident. Panel A shows the position of the tractor and trailer when the accident load is dumped. Note that the tractor is oriented nearly 90° to the trailer. The truck was parked on a slide grade, which tilted the trailer vertically as shown in panel B. Panel C shows the final position of the trailer after tipping over.

In this case, expert engineers and animators worked together to create 3D models of the adjustable foot pedals based on the 2D drawings and descriptions provided in the patent specifications. This effort helped translate difficult-to-understand descriptions of prior art pedals into easy-to-understand, animated 3D models. The 3D models were used as demonstrative exhibits, and then entered into the record as evidence, for use throughout the litigation process.

Showing the Sequence of Events

Animations are also effective tools for illustrating the sequence of events that led to an accident. For example, in one case, an articulated tractor-trailer tipped onto the cab of a truck, severely injuring the driver. The tractor-trailer operator had dumped a load of dirt at a site that was not properly prepared for dumping, violating a number of operational procedures. Using data from the site and detailed data about the truck, animations were created to show the sequence of events and the operator errors that contributed to the tragic accident.

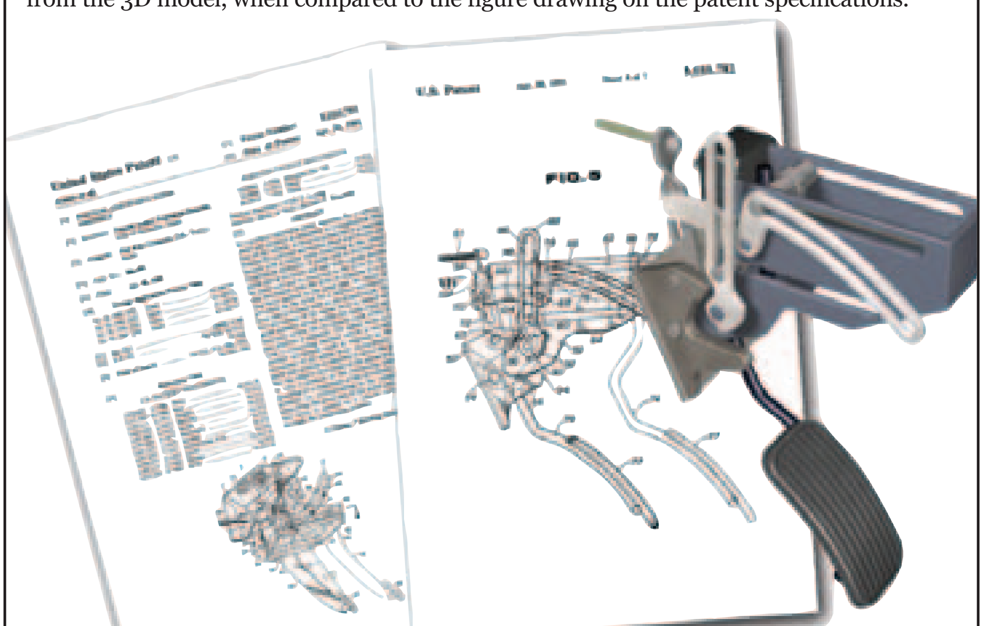
The first break in proper dumping procedure occurred when the operator selected a site that was not level. The slope was not steep, but it created a dangerous condition when the front of the trailer was raised into the dumping position. The second error that contributed to this tragic accident was the misalignment of the tractor with the trailer.

The tractor was oriented at an extreme angle to the trailer, further increasing the risk. Panel A in Figure 3 shows this hazardous alignment of the tractor, which put the cab and the occupant in harm's way when the trailer tipped over. When the rear portion of the load left the trailer, and the front portion remained stationary, the center of gravity shifted forward and upward. Because the trailer was on a small slope, the center of gravity shifted not only forward and upward, but also toward the left side of the trailer. This caused the trailer to roll to the left and fall onto the cab of the tractor, as seen in Panels B and C in Figure 3.

The visualizations made the facts of this case clear quickly and easily, in a way that helped ensure consistency by minimizing the variability that can be introduced as people try to interpret the data. The animation was used in mediation, and the dispute was settled.

Continued on page 33

Figure 2: Engineers and animators created 3D models of adjustable foot pedals described in prior art patents. Note how easy it is to comprehend the structure of the pedal assembly from the 3D model, when compared to the figure drawing on the patent specifications.



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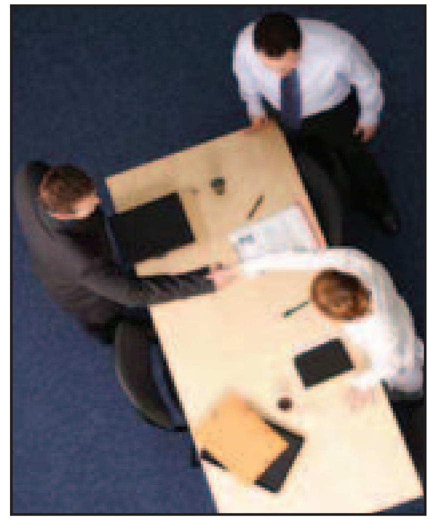
How to Choose a Good Mediator

Most lawyers want someone from their background, but picking from "the other side" can be smarter



By Scott Delius
Georgia Academy of Mediators & Arbitrators

How do litigating parties pick a mediator? Everyone has ideas about mediation strategy, but how does the selection of a mediator affect the outcome of the negotiations? The answer may surprise you.

Litigating parties often have a preconceived notion of who their mediator should be. The defense lawyer usually wants a mediator with a defense background, whereas the plaintiff's attorney generally wants a mediator with experience representing plaintiffs. Opposing counsel sometimes refuse to use a particular mediator because of the kind of work that the mediator does in private practice. The implication, and it's not really implied at all, is that the mediator is incapable of being neutral because of his or her practice area.

This has always seemed counter-intuitive to me, even before I became a mediator. I suppose that there are indeed "neutrals" out there who, in fact, are not. Thankfully, I don't know any of them. My favorite saying as a mediator is that I have but one allegiance, one party to whom I am faithful, and that is to "the settlement" itself. A mediator should not be concerned with impressing one side or another. That will come naturally if the case settles.

In any event, and for whatever reason, the conventional wisdom says that each side should strive to hire a mediator who does "their kind of work." Supposedly having a fellow defense lawyer as a mediator is going to help the defense negotiate a better deal, and the assumption is that the mediator who represents plaintiffs will do the same for that side.

After successfully settling hundreds upon hundreds of cases as a mediator, I have a different perspective. I believe that lawyers should re-think the impulse to have "one of their own" act as mediator in every case. A closer look at the dynamics of a particular case may call for a completely different approach.

In my other life as a litigator, I often employ the "plaintiff's expert" in my defense cases and vice versa in my plaintiff's cases. I do that because I want a different perspective. I want my expert to identify both positive and negative issues, not just what they think I want to hear. I usually know what my strengths are, but I need my expert to also help me identify my weaknesses. An expert who only works for one "side" or the other may be lacking in that ability. That same philosophy may also be applied to mediators.

It doesn't do a litigating party much good to have a mediator tell them what they want to hear. Praise isn't always necessarily what's best for our clients. Do you really want your mediator to tell you and your client that your case is rock solid, that you can't lose and that you shouldn't budge an inch? Maybe your client will appreciate it, but that probably isn't going to help you settle your case.

Indeed, a good mediator asks the tough questions and points out the biggest risks to both parties. After all, that's why you've come to the mediation table in the first place: to minimize your risk. How are you going to accomplish that if you don't know what your risks are? I will submit that it's a little too late once a jury lets you in on the secret.

As a defense lawyer, there are some instances where you should strongly consider hiring a mediator who has the experience of litigating plaintiff's cases. If the plaintiff has unreasonable expectations, there's nothing more valuable than having a mediator who has the ability to look the plaintiff in the eye and tell him why his case is not worth what he thinks it is.

Plaintiff's lawyers have already acquired that skill by having had the same heart-to-heart conversations with their own plaintiff-clients. Credibility is everything to a plaintiff unversed in the law. It can be quite difficult to settle a case if the mediator is unable to make a "connection" with the plaintiff, especially where valuation is a sticking point.

Plaintiffs' attorneys, too, should consider hiring a mediator "from the other side." If the plaintiff's attorney believes the other side is undervaluing their case, an experienced defense lawyer working as a mediator can be extremely effective when it comes to persuading the defendant to offer more money. Defense lawyers are skilled at advising general counsel, risk managers and insurance professionals on how to do their jobs. Plaintiffs' attorneys may have experience negotiating with such individuals, but that's not what a good mediator does. An effective mediator speaks directly to the decision-maker for the defense to help them do their job, which is to minimize the risk to their company or insured.

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Updates in the Changing World of Slip-and-Fall Defense

By John Leffler, PE
FORCON International

Introduction

A trend towards higher rigor and improved methodological defensibility in slip-and-fall analysis began about 10 years ago. The past two to three years have brought still more changes—some competent, and some less so. An article published in the February 2013 edition of DRI's *For The Defense,* "The Changing World of Slip-and-Fall Defense" (co-authored by Leffler, Barré and Reneau), outlined the advent of human slip research as a technical foundation for tribometer device testing of walkway traction.

That article also described the use of an InterLaboratory Study (ILS) to evaluate the repeatability and reproducibility of tribometer traction measurements. This article will discuss other considerations and provide a four-element guideline for evaluating the reliability of tribometer testing.

As a prefacing note, pedestrian slip-and-fall incidents may involve both *intrinsic* elements related to the pedestrian (medical conditions, medications, activities, attentiveness, etc.), as well as *extrinsic* elements related to the walkway environment (traction, contaminants, illumination, distractions, etc.).

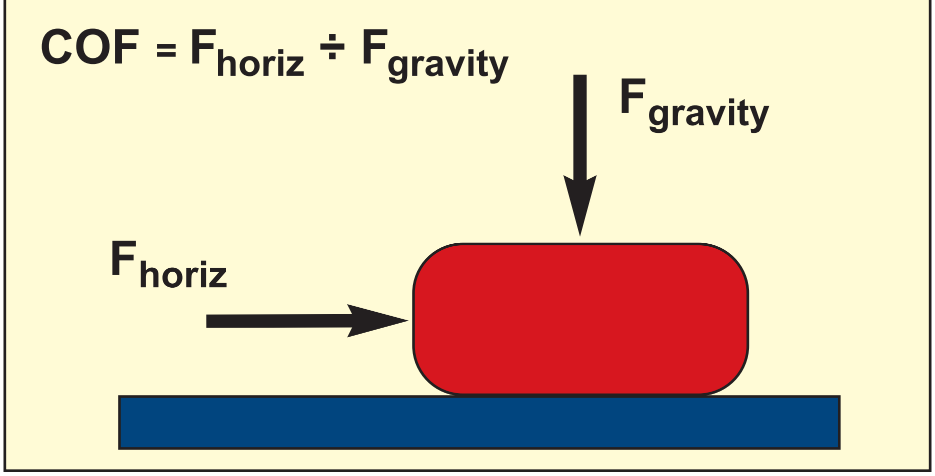
Pedestrian Slip Events

There are two main types of pedestrian slip events that are routinely studied:

1) Heel slip: This is the most common cause of a slip-related fall. At the end of the swing phase of the stride, as the leading heel contacts the walkway, the heel slides forward. The momentum of the pedestrian exacerbates the slip, and the leading leg is unable to support its share of the body weight.

2) Toe slip: A toe slip occurs when the trailing foot slips at push off. A toe slip rarely results in a fall, since most body weight has already been transferred to the leading leg.

Figure 1: Coefficient of Friction (COF)



Coefficient of Friction and Slip Resistance

The simplest and most familiar quantifier regarding friction (and pedestrian traction) is the Coefficient of Friction or COF. This is a force ratio that can be expressed visually as shown in Figure 1 above.

Walkway traction measurements may be obtained through several methods, which include:

- *Human subject traction demand testing*: In this testing, human test subjects walk along a laboratory walkway that includes a *forceplate*. This thick metal plate is mounted flush to the walkway and is supported by electronic force sensors. These measure the vertical, lateral, and longitudinal walking forces applied to it by the human test subjects. Recalling the "force ratio" concept of COF, these force measurements are used to calculate the traction required by that pedestrian. These measurements (often referred to as "required COF" or "utilized COF") typically do not involve the pedestrian slipping—adequate traction is provided on the forceplate surface.
- *Human subject slip testing*: In this testing, human test subjects walk along a slippery walkway, and the relative frequency of slips is analyzed. Ramped walkway slip testing (common in Europe) is also done, in which a ramp surface is traversed by a trained human test subject (walking forward down and backwards up the ramp) while the ramp angle is increased up to the point of slip—and the friction measurement is derived from that ramp angle. The reliability of testing involving actual human slips may be affected by *expectation*—depending upon how the testing is conducted; if the human test subject knows or suspects they may slip, they may modify how they walk.
- *Tribometer testing*: A walkway tribometer is a mechanical or electromechanical device used to measure the frictional forces between a walkway surface and a footwear material surface. It is important to note that tribometers are measuring the traction *available to a machine*—not the traction that would be experienced by a human. Therefore, it is important to have a reliable correlation of the tribometer measurements to actual human slip experiences.

A more relevant term for pedestrian walkway traction is "slip resistance." This term is (in practice) often used interchangeably with COF, though its definition clearly goes beyond that of COF. Slip resistance, as defined by the American Society for Testing Materials (ASTM) standards is: "The relative force that resists the tendency of the shoe or foot to slide along the walkway surface. Slip resistance is

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presumption arises that the evidence would have been harmful to the spoliator. In order for a party to be able to pursue a remedy for spoliation, the spoliating party must have been under a duty to preserve the evidence at issue and the injured party must show that it suffered harm as a result of the spoliation. The Georgia Supreme Court's decision in *Phillips* addresses when and under what circumstances it can be said that litigation is "contemplated" sufficient to put a party on notice.

The State of the Law Pre-*Phillips*

Before analyzing *Phillips*, it may be helpful to briefly review a couple of cases decided by the Court of Appeals in order to compare how the Court of Appeals resolved spoliation issues with the state of spoliation law as expressed by the Supreme Court in *Phillips*. Prior to *Phillips*, a string of Georgia Court of Appeals cases focused on the aforementioned distinction between notice of "potential liability" versus notice of "potential litigation."

For example, in *Powers v. Southern Family Markets of Eastman*, LLC, 320 Ga. App 478 (2013), which was expressly overruled by *Phillips*, the plaintiff brought suit as the result of slipping and falling on water which had accumulated on the floor of a grocery store.

After the plaintiff fell, the store manager completed a written incident report, took pictures, and drew a diagram of the incident scene. The incident report contained pre-printed language that the report was "prepared in anticipation of litigation."

In addition, the store manager reported the incident to the grocery store's risk manager who contacted the plaintiff to determine if she was injured and to follow up on the initial investigation. All of these actions were routinely undertaken any time a customer was injured on the grocery store's premises.

The plaintiff's fall was captured by video cameras located in the store. However, affirmative steps were not taken to preserve any video from the day of the incident, and the video was ultimately recorded over, as would normally occur with any other video footage at the store. Approximately three months later, the store was contacted by the plaintiff's attorney and the store received its first formal notice of contemplated litigation. Because the video was no longer in existence, the plaintiff filed a motion for sanctions as the result of the store's destruction of the video.

In affirming the trial court's denial of that motion, the Court of Appeals emphasized that while the store's investigation of the incident (which included the preparation of incident reports, the taking of photographs, and reporting the incident to a risk manager) may have reflected a contemplation of liability, it did not demonstrate contemplated or pending litigation.

The Court in *Powers* focused on the lack of express or actual notice and implicitly recognized the difficulties associated with assessing a party's state of mind in order to determine whether the party was simply on notice of potential liability or whether it had crossed the threshold to contemplating litigation.

Also overruled by *Phillips* is *Paggett v. Kroger Co.*, 311 Ga. App. 690 (2011). In that case, the plaintiff brought suit after slipping and falling on liquid that had accumulated on the ground at a gas station. Similar to the facts in *Powers*, surveillance video which recorded the plaintiff's fall was subsequently recorded over.

The plaintiff claimed that Kroger was put on sufficient notice to require the preservation of evidence of the footage as early as the day of the fall. The plaintiff pointed to evidence that, immediately after the fall, the Kroger unit manager filled out a standardized "Slip/Fall Incident Report" that contained the pre-printed language: "This report is being prepared in anticipation of litigation under the direction of legal counsel." Although Kroger conducted an investigation and completed an incident report, the Court of Appeals affirmed the trial court's determination that no spoliation occurred because Kroger was not contemplating litigation when the video recording was destroyed. Although Kroger investigated the incident and there was evidence that a report was prepared that could be relied upon if litigation were to occur, the Court of Appeals focused on the lack of express or actual notice to Kroger that litigation was being contemplated by the customer.

On the other hand, in *Baxley v. Hakiel Industries, Inc.*, 282 Ga. 312 (2007), the Georgia Supreme Court's analysis focused on the actions taken by a party after the incident occurred, as opposed to whether express or actual notice of a claim was provided, in order to determine when the duty to preserve was triggered.

In that case, the plaintiff brought suit against a bar after his motorcycle was struck by one of the bar's patrons who had been consuming alcohol at the bar. The day after the accident, the bar's manager learned of the incident and questioned her staff as to what the patron had been served. Three video cameras were in operation on the premises, but the tape from the date of the accident was recorded over after four days, in the regular course of business.

Even though no express or actual notice had been provided, the Court nonetheless found that the bar should have preserved the video tape since the manager interviewed her employees and, as a result, was apparently aware of the potential for litigation.

Importantly, several cases were decided by the Court of Appeals after *Baxley* (including *Powers* and *Paggett*) in which it was held that the duty to preserve was not triggered even though there was even more evidence of investigation (and other activities suggesting a potential for litigation) by a tortfeasor than was present in *Baxley*. The Supreme Court granted *cert* in *Phillips* in order to make it clear that express or actual notice of litigation is not required and also to set forth certain factors which may be considered when determining whether litigation is being contemplated.

Phillips and What it Means for an Uninformed Party

In *Phillips*, the plaintiffs brought a medical malpractice action against healthcare providers, alleging that Phillips suffered oxygen deprivation before birth resulting in severe and permanent neurological injuries. The case proceeded to trial and, after a day and a half of deliberations, the jury returned a defense verdict.

The plaintiffs appealed and claimed that, among other things, the trial court erred by refusing to give a requested charge on spoliation of evidence. The destroyed evidence at issue was printed paper strips of the electronic monitoring of Phillips' fetal heart rate. The plaintiffs claimed that the defendants acted negligently in monitoring and responding to Phillips' heart decelerations and other signs indicating fetal distress.

At the time of Phillips' birth, nurses often took notes on paper fetal monitor strips during labor and delivery; and, even though these strips were not considered a part of the hospital's official record, the nurses would sometimes refer back to their notes. The hospital maintained the strips for 30 days post-delivery, and then would routinely destroy them, as was the case with the strips at issue. There was some evidence that there were nursing notations on the strips which were relevant to the timeliness of the response to Phillips' signs of fetal distress. As such, the plaintiffs requested that a spoliation charge be given to the jury.

> "The Supreme Court in *Phillips* concluded that the defendants should have realized that litigation was reasonably foreseeable due to the nature of the injuries, the potential for high damages, the frequency of litigation in similar circumstances, and the defendant's internal investigation and notification to its counsel and insurer."

The trial court declined to give the charge after finding that the defendants had no knowledge or notice of potential litigation. Importantly, at the time the paper strips were destroyed, the hospital had launched an internal investigation, questioned involved personnel, notified its insurance carrier, and contacted its legal counsel.

The Court of Appeals affirmed the trial court's determination and found no notice of pending or contemplated litigation because the hospital had not received any letters, calls, pleadings, or inquiries from the plaintiffs that might have alerted the hospital of litigation.

The Court of Appeals went on to cite its own precedent for the proposition that merely launching an internal investigation and taking steps pursuant to company policies do not, without more, equate to notice that litigation is contemplated or pending. It also concluded that the Supreme Court's decision in *Baxley* did not mandate a finding of spoliation by finding that the phrase "potential for litigation" referred to litigation that is actually "contemplated or pending," and "nothing more."

In reversing the Court of Appeals, the Supreme Court found that the Court of Appeals erroneously interpreted and applied the spoliation standards in *Phillips*. In essence, the Supreme Court found that express or actual notice of contemplated litigation does not have to be given in order to trigger a duty to preserve. Instead, a duty to preserve may be constructively inferred based on a party's actions.

Borrowing reasoning found in decisions of federal courts, the Supreme Court went on to hold that the duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence and it is triggered not only when litigation is pending, but also when it is reasonably foreseeable to that party. With regard to plaintiffs, the duty arises when litigation is "obviously foreseeable." Because a plaintiff is the party who determines whether to litigate or not, plaintiffs appear to have a clear advantage when it comes to determining reasonable foreseeability.

Because reasonable foreseeability is less clear from a defendant's perspective, the Court offered several factors that may be considered to determine whether the duty to preserve has been triggered. These factors include the type and extent of the injury, the extent to which fault for the injury is clear, the potential financial exposure if faced with a finding of liability, the relationship and course of conduct between the parties, and the frequency with which litigation occurs in similar circumstances. The Court also found it appropriate to consider what the defendant did or did not do in response to the injury, including the initiation and extent of any internal investigation, the reasons for any notification of counsel and insurers, and any expression by the defendant that it was acting in anticipation of litigation. The Court in *Phillips* concluded that the defendants should have realized that litigation was reasonably foreseeable due to the nature of the injuries, the potential for high damages, the frequency of litigation in similar circumstances, and the defendant's internal investigation and notification to its counsel and insurer.

While the Supreme Court's discussion of the criteria to be considered was undoubtedly intended to illuminate the circumstances under which a duty to preserve arises, it arguably created more questions than answers given the inherent subjectivity associated with the constructive notice criteria. What constitutes a serious injury and how much financial exposure is enough? When is fault "clear" and how does a defendant predict what sort of allegations a plaintiff may later make with regard to fault? How often is frequent enough to satisfy the frequency factor? Is it types of cases that result in litigation 35 percent of the time or 51 percent of the time? When does an investigation arise to the level of constructive notice? When determining the reasons for notifying counsel and insurers, will plaintiffs now be able to review communications with counsel and an adjuster's notes?

Although a defendant's duty to preserve must be viewed from its own perspective, a defendant's perspective of whether litigation is reasonably foreseeable is predicated entirely upon a plaintiff's perspective since plaintiffs determine whether or not to pursue litigation. Arguably, defendants have been placed in the unfortunate position of being required to conduct a thorough investigation after an incident occurs in order to answer these questions and determine whether evidence must be preserved. Thus, it is fair to say that the holding in *Phillips* places much more of a burden on defendants than plaintiffs.

In sum, the Supreme Court was presented with two options in *Phillips*: (1) affirm the Court of Appeals line of cases holding that express or actual notice places a party on notice; or (2) overrule those cases and ask trial courts to weigh the Phillips factors and determine whether litigation was reasonably foreseeable. Because the latter option was chosen, parties to a lawsuit, defendants in particular, must now carefully determine whether evidence must be retained. ❖

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Georgia Supreme Court Issues Apportionment Opinion

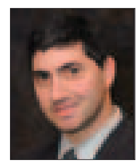
Continued from page 15

that "fault" literally means "liability" for the purposes of the apportionment statute, however, it has been misunderstood. In the first place, "fault" is used with reference to plaintiffs in subsection (a), and saying that a plaintiff has "liability" to himself would be nonsense. By the same token, "fault" is used with respect to nonparties in subsection (c), but a subsequent provision of the statute makes clear that "fault" assigned to a nonparty "shall not subject any nonparty to liability." OCGA § 51-12-33 (f) (2). And even in subsection (b), it would make no sense to say that damages are to be apportioned "among the persons who are liable according to the percentage of [liability] of each person." OCGA § 51-12-33 (b). "Fault" is the measure of liability under subsection (b) for defendants who are liable, but it does not literally mean "liability" (2015 Ga. LEXIS 547, *12, n.5).

The Supreme Court went on to explain that in the context of apportionment to a nonparty, "'fault' that 'contributed to the alleged injury or damages' must refer to a breach of a legal duty in the nature of tort that is owed for the protection of the plaintiff, the breach of which is a proximate cause of his injury." *Id.* at 12. In turn, the nonparty apportionment provision, O.C.G.A. § 51-12-33(c), "require[s] the trier of fact to consider any breach of a legal duty that sounds in tort for the protection of the plaintiff, the breach of which is a proximate cause of the injury about which he complains whether that breach is attributable to the plaintiff himself, a defendant with liability, or another." *Id.* at 14.

Of key importance in the Supreme Court's opinion in *Zaldivar* is the explicit recognition that nonparty apportionment is available regardless of whether the nonparty has an affirmative defense or is immune from suit by the plaintiff. "Although such a defense or immunity may cut off liability, a tortfeasor is still a tortfeasor, and nothing about his defense or immunity means that he cannot be said to have committed a tort that was a proximate cause of the injury to the plaintiff." *Id.* at 18-19. "As such, the apportionment statute permits consideration, generally speaking, of the 'fault' of a tortfeasor, notwithstanding that he may have a meritorious affirmative defense or claim of immunity against any liability to the plaintiff." *Id.* at 19.

Put simply, the Supreme Court's decision in *Zaldivar* means that "the apportionment statute contemplates the consideration [by the jury] of the 'fault of all persons or entities who contributed to the alleged injury or damages,' regardless of their liability or potential liability to the plaintiff in tort." *Id.* at 16. This is a significant victory for the defense bar and for defendants in tort cases in Georgia, in that it reinforces the primary purpose of nonparty apportionment—that of helping to ensure that a defendant pays only his fair share of a plaintiff's damages in any tort suit.❖



Martin A. (Marty) Levinson is a partner at Hawkins Parnell Thackston & Young in Atlanta. He is a member of the GDLA Board of Directors and chairs the Amicus Committee. Mr. Levinson authored the GDLA's amicus *brief in* Zaldivar v. Prickett.

Visualization

Continued from page 24

Conclusion

Massive data collection and immersive, powerful tools for visualization and analysis have changed the litigation landscape, tearing down boundaries in terms of what we know and how we communicate about an event. Today, attorneys better appreciate how visualization of data can drive critical understanding of technical concepts at all stages of litigation, from capturing and analyzing data associated with an event to detailing and communicating key concepts for a hearing, settlement conference, or trial demonstrative.

Just as importantly, attorneys now realize the importance of engaging the right resources to make sense of the vast volumes of data—people with the experience and expertise to understand not only the technical complexities of the work, but also how to use the right tools to translate the data into effective and highly accurate visualizations. They understand how critical it can be that the teams have the knowledge and qualifications needed not only to gather and use the right data, but also to attest to the methodologies used to turn them into visualizations, and ensure that they are viewed as credible and accurate, and can stand up in court. ❖

Chuck Fox, Ph.D., leads the Visualization practice at ESI, which helps legal teams by developing compelling visualization tools designed to engage stakeholders and improve how we communicate technical or complex subject matter. His team has created visualizations for over 1,500 litigation matters across a wide variety of technical and industry disciplines, including high profile accidents and disasters like Princess Diana's accident, the TWA Flight 800 disaster, the Exxon Valdez oil spill, Hurricane Katrina, and the Oklahoma City bombing.

Auto Liability Case Law Update

By David M. Atkinson
Magill Atkinson Dermer, Atlanta

UNINSURED MOTORIST COVERAGE: *Travelers Home and Marine Insurance Company v. Luis Castellanos,* S14G1878, 2015 Ga. LEXIS 350 (June 1, 2015)

The Supreme Court of Georgia—in *Travelers Home and Marine Ins. Co. v. Castellanos*—clarified the burden of proof for a plaintiff claiming uninsured motorist ("UM") benefits based on a denial of coverage to the tortfeasor for lack of cooperation. Rather than requiring Luis Castellanos—the plaintiff—to prove his case and establish coverage under the policy, the Court of Appeals placed the burden of proof on Travelers Home and Marine Ins. Co. ("Travelers")—Castellanos' UM carrier—to affirmatively disprove Castellanos' case. In a unanimous decision, the Supreme Court reversed the Court of Appeals, holding that Travelers was entitled to summary judgment because Castellanos had failed to meet his burden of proof. However, the Supreme Court also held that there is a presumption of prejudice when the insured tortfeasor fails to attend trial, provided there is evidence that the insurer requested the insured's cooperation.

In the underlying case, Castellanos filed suit against Jose Santiago, seeking to recover for injuries sustained in an automobile accident. Santiago's insurer, United Automobile Insurance Company ("United"), defended him through trial. After the jury entered a verdict in favor of Castellanos that included both compensatory and punitive damages, United offered to pay the compensatory damages but stated that its policy did not provide coverage for punitive damages. When Castellanos refused to accept payment, United denied coverage based on Santiago's alleged failure to cooperate. Castellanos then demanded that Travelers pay the judgment pursuant to the UM coverage afforded by his policy. When Travelers refused, Castellanos filed suit.

The issue in the subsequent coverage lawsuit was whether Santiago was the owner or operator of an "uninsured motor vehicle." The Travelers policy defined an "uninsured motor vehicle" as one for which an insurance company "legally denies coverage." (This language is consistent with the requirements of the Georgia Uninsured Motorists Act, O.G.C.A. § 33-7-11(d)(1)(D)(iii).) Thus, Castellanos could not claim UM benefits unless United had "legally denied" coverage to Santiago based on his alleged failure to cooperate.

The case came before the trial court on cross-motions for summary judgment. The trial court granted summary judgment to Travelers based on its conclusion that Castellanos had "failed to present evidence that there was a 'legal denial' of coverage by United." *Castellanos v. Travelers Home & Marine Ins. Co.,* 328 Ga. App. 674, 676 (2014). On appeal, the Court of Appeals held that the trial court had improperly shifted the burden to Castellanos to come forward with evidence to rebut Travelers' defense. *Id.* at 678-679. Although the opinion was somewhat unclear, the Court of Appeals majority seemed to suggest that Castellanos need only show that United had denied coverage to Santiago to meet his threshold burden of showing that he was entitled to UM benefits, and that Travelers then bore the burden of proof to establish its "affirmative defense" that there had not been a legal denial of coverage. *Id.* The dissent agreed with Travelers that Castellanos was required to produce evidence that United had "legally denied" coverage in order to meet his burden on summary judgment and that the trial court properly granted summary judgment to Travelers because he failed to do so. *Id.* at 680-685 (McMillian, J., dissenting).

The Supreme Court granted certiorari "to clarify the burden of proof issue." 2015 Ga. LEXIS 350 at *2. The Supreme Court adopted the analysis of the Court of Appeals dissent regarding the relative burdens of proof, stating:

> It is well settled . . . that Castellanos, as the insured, had "the . . . burden to prove (1) the existence of a policy of liability insurance containing uninsured motorist protection, and (2) that [Santiago] was an uninsured motorist at the time of the [wreck]". . . .

> This requirement is simply a reiteration of the principle that an insured claiming an insurance benefit "has the burden of proving that a claim falls within the coverage of the policy." Thus, "[t]o establish a prima facie case on a claim under a policy of insurance the insured must show the occurrence was within the risk insured against." . . .

Id. at *4-5 (quoting *Castellanos*, 328 Ga. App. at 680-681 (McMillian, Jr., dissenting)). The Supreme Court then clarified the burden of proof, stating:

> Thus, in order to present a prima facie case for coverage and thereby withstand Travelers' motion for summary judgment on his bad faith refusal of pay claim, Castellanos bears the burden of presenting evidence that Santiago's vehicle was an uninsured motor vehicle under the UM provisions of the Travelers policy. Where, as here, Castellanos avers that Santiago's vehicle was uninsured by virtue of United's denial of coverage, Castellanos must show that this denial was legally sustainable.

Id. at *5-6.

After clarifying the burdens of proof, the Supreme Court addressed whether Castellanos had established that United "legally denied" coverage to Santiago based on his failure to cooperate. To justify a denial of coverage for an insured's non-cooperation under Georgia law, the insurer must establish: (a) that it reasonably requested the insured's cooperation in defending against the plaintiff's claim; (b) that its insured willfully and intentionally failed to cooperate; and (c) that the insured's failure to cooperate prejudiced the insurer's defense of the claim. *Id.* at *6 (citations omitted). The Supreme Court explained that as the party claiming coverage, Castellanos bore the same burden of proof:

> Here, Castellanos must prove these same elements to demonstrate that United's denial of coverage was legally sustainable and that, therefore, Santiago was an uninsured motorist under the Travelers policy. . . . Specifically, Castellanos bears the burden of producing evidence that (1) United reasonably requested Santiago's cooperation in the tort litigation; (2) Santiago willfully and intentionally refused to cooperate; and (3) prejudice resulted therefrom.

Id. at *6-7.

The Supreme Court noted that the plaintiff's claiming UM benefits is a stranger to the relationship between the tortfeasor and its insurer and that the plaintiff's access to the information necessary to establish his claims will therefore be limited. As a result, "[i]n obtaining such evidence, the plaintiff will likely be compelled to resort to discovery from the insurer regarding its efforts to contact its insured and its lack of success in securing cooperation; given its potential liability for refusal of pay a covered claim, we would expect the insurer to maintain documentation to substantiate its non-cooperation defense, and requiring the plaintiff to obtain such evidence to establish his resulting entitlement to UM coverage is not unreasonable." *Id.* at *7-8.

The Supreme Court reasoned that, in some circumstances, "the likelihood of prejudice may be so high that it can be presumed, even in the absence of concrete evidence," and that the "complete absence of the tortfeasor from trial is such a circumstance." *Id.* at *8. Accordingly, the Supreme Court held that, in the UM context, "a plaintiff may rely on a presumption that the tortfeasor's complete absence from trial prejudiced the tortfeasor's insurer so as to permit that insurer to lawfully deny coverage to the tortfeasor, subject to rebuttal by the UM carrier." *Id.* at *9.

Notwithstanding this presumption, however, the Supreme Court found that Castellanos had failed to satisfy his burden of proof in showing that United reasonably requested Santiago's cooperation. For that reason, Travelers was entitled to summary judgment. It remains to be seen whether this presumption of prejudice will be extended to a claim against an insurer which denies coverage for lack of cooperation, or if it will be limited to the UM context. ❖

Mass Torts Case Law Update

By Todd E. Schwartz, SLS Chair

Lewis Brisbois Bisgaard & Smith, Atlanta

***Scapa Dryer Fabrics, Inc. v. Knight*, Court of Appeals of Georgia, A14A1587 (March 30, 2015)**

The Court of Appeals upheld a jury verdict in favor of the Knights in this asbestos exposure case. The Knights sued numerous defendants, including Scapa Dryer Fabrics, Inc. ("Scapa"), alleging that exposure to asbestos from those defendants' products contributed to Mr. Knight contracting mesothelioma. Only two defendants remained at trial—Scapa and Union Carbide Corporation ("Union Carbide").

The jury returned a verdict in the amount of $10,500,000 and apportioned fault as follows: Scapa—40 percent; Union Carbide—40 percent; and non-party Georgia-Pacific—20 percent. The court reduced the verdict to $10,468,462.37 to properly reflect the amount of Mr. Knight's medical expenses. Scapa appealed the jury verdict on numerous grounds.

The Court of Appeals upheld the verdict, holding that the evidence presented at trial was sufficient for the jury to find in favor of the Knights. Specifically, Mr. Knight's work at Scapa's plant on various occasions between 1969 and 1973 was enough to support the jury's verdict against Scapa.

In making its ruling, the Court of Appeals concluded that the trial court did not abuse its discretion in allowing Plaintiffs' expert, Dr. Jerrold Abraham, to testify at trial about the causation of Mr. Knight's cancer. Scapa argued that the trial court should have conducted a hearing to determine the admissibility of Dr. Abraham's testimony as to specific causation, and precluded any testimony in violation of the *Butler v. Union Carbide* decision (310 Ga. App. 21). Without conducting a *Daubert* hearing, the trial court admitted Dr. Abraham's testimony as to Scapa's causation of Mr. Knight's mesothelioma.

The Court of Appeals found no error with the trial court's making such a ruling without a hearing, holding that O.C.G.A. § 24-9-67.1 does not mandate a hearing. The Court of Appeals further held that Dr. Abraham's causation testimony was different than the excluded opinions in *Butler*, and that, as a result, it was proper to allow Dr. Abraham's opinions that exposure to asbestos while at the Scapa plant contributed to Mr. Knight's mesothelioma. The Court of Appeals, without significant explanation, ruled that Dr. Abraham's methodology was founded on scientific investigation and, therefore, sufficient under *Daubert*.

In addition, the Court of Appeals held that the trial court did not err in allowing a jury charge on negligence that included the terms "risk" and "utility," as the charge as a whole set forth the correct law on negligence, making any such error harmless. Further, the Court of Appeals held that the trial court did not err by excluding two of Scapa's requested charges, again concluding that the given charge—as a whole—covered those areas of law.

Finally, the Court of Appeals concluded that the trial court did not err in admitting certain exhibits and testimony related to Scapa's knowledge of the existence of asbestos or Mr. Knight's lay witness testimony that certain products at the Scapa plant contained asbestos. As for Mr. Knight's testimony, the Court of Appeals held that the curative instruction given by the trial court was sufficient since no objection to it was raised during the trial.

Two judges dissented and submitted a dissenting opinion authored by Presiding Judge Gary B. Andrews. The dissent contended that the testimony of Dr. Abraham was consistent with the testimony excluded in the *Butler* opinion, and accordingly should have been excluded in this case. Without such specific causation testimony by Plaintiffs' expert, the dissent believed Plaintiffs failed to prove an essential element of their cause of action against Scapa. Therefore, according to the dissent, the trial court erred by denying Scapa's post-trial motions, the trial court's decision should be reversed, and the case should be remanded for a new trial.

Scapa has filed a Petition for Writ of Certiorari to the Supreme Court of Georgia. The Supreme Court has yet to issue a ruling. ❖

Continued from page 16

possessory rights in, or control over, certain property or premises."[7] *Webster's Third New International Dictionary* defines "occupier" as "one who holds possession of property as owner or tenant."[8] Such a broad definition of "occupier" is not useful to the present analysis because it ignores an important element of O.C.G.A. § 51-3-1.

The duty imposed by O.C.G.A. § 51-3-1 applies only with respect to invitees of the owner or the occupier. "An invitee is someone whom a landowner [or an occupier], by express or implied invitation, induces or leads to come upon his premises for any lawful purpose."[9] The controlling factor is whether the person coming onto the premises has present business relations with the owner or the occupier such that her presence is mutually beneficial.[10] A tenant of an apartment complex is an invitee of the owner and the management company because they have invited the tenant to enter the premises and they have mutually beneficial business relations with the tenant. The property manager, however, has not issued any invitation to the tenant, at least not in her personal capacity, and does not have any personal business relationship with the tenant. Of course, the owner and the management company must act through the management company's employees, and so the property manager may extend an invitation to the tenant to enter into or renew a lease, but she does so as an agent of the owner and the management company, not in her personal capacity. Similarly, the property manager has a personal financial interest in performing her job duties well so that she remains employed and perhaps receives a bonus or a pay increase, but that interest seems to be insufficiently connected with any specific tenant so as to create a mutually beneficial business relationship. Indeed, every employee at an apartment complex has this interest, and so every employee would be an occupier if this were enough to establish an invitee relationship. In sum, the property manager does not have personal business dealings with the tenant such that the tenant is her personal invitee. Without an invitee relationship between the property manager and the tenant, the property manager cannot be liable to the tenant under O.C.G.A. § 51-3-1, regardless of whether she otherwise could be classified as an occupier based on her supervisory responsibility over the property.

An alternative way of characterizing the property manager's role is to say that she does not exercise control over the premises despite her responsibility for the day-to-day operations.

This is why the broad definition of "occupier" (as one who exercises control over the premises) expressed by the Georgia Court of Appeals is too vague to be useful. A property manager controls the apartment complex insofar as she is responsible for its day-to-day operations, but she lacks the mutually beneficial purpose that is required to create an occupier-invitee relationship with the tenants. An alternative way of characterizing the property manager's role is to say that she does not exercise control over the premises despite her responsibility for the day-to-day operations. This makes sense because the property manager does not have the same right to control the premises as the management company. The management company is an occupier because it has a right and an obligation to control the premises pursuant to a contract with the owner. In contrast, the property manager has no supervisory authority over the premises bestowed by contract with the owner, and so she has no right or obligation to control the premises vis-à-vis the owner. Instead, the property manager's authority derives solely from her employment by the management company.[11]

Herein lies the impracticality of the broad definition of "occupier" expressed by the Georgia Court of Appeals. If merely exercising some type of control over the premises is, by itself, sufficient to qualify as an occupier, then there would be virtually no limit to the employees of the management company who could be sued as occupiers under O.C.G.A. § 51-3-1. All supervisory and managerial employees of the management company would be occupiers, as well as many employees above the property manager in the company hierarchy. The officers and directors also would be occupiers. If the management company is a limited liability company, all of its members could be occupiers, and if the management company is a corporation, all of its shareholders could be occupiers. All of these people "control" the property in some form or another. Moreover, certain employees below the property manager in the company hierarchy also could be occupiers. The maintenance supervisor, for example, "controls" certain aspects of an apartment complex. But these cannot logically be peo-

ple who were intended to be included within the meaning of "occupier." This is not to say that natural people cannot be occupiers. For example, if a person contracts in her personal capacity with the owner of an apartment complex to provide property management services, she would be an occupier.[12] People can be occupiers, but employees of occupiers cannot.

Some cases have suggested that a managerial employee may be personally liable for misfeasance in managing the premises because she acted as an agent of the management company, which is an occupier under O.C.G.A. § 51-3-1.[13] In other words, the argument is that a managerial employee is liable for her own tortious conduct, irrespective of whether she was acting within the scope of her employment, and her liability does not depend on whether her employer may also be sued. This is a true statement, but it is too general to be useful to the inquiry at hand. Of course a person is liable for her own tortious conduct, but that does not answer the antecedent question of whether the conduct was tortious. To say that a person failed to do something, such as failing to provide adequate security, is meaningless unless the law required the person to take that action. In other words, a person's conduct cannot be classified as tortious in a vacuum; it is tortious only if it violates a legal duty. That is why the same conduct can be tortious in some circumstances but not in others.[14] Thus, to sustain any claim based on negligence, the plaintiff must identify "either a duty imposed by a valid statutory enactment of the legislature or a duty imposed by a recognized common law principle declared in the reported decisions of [Georgia's] appellate courts."[15] The typical negligent security case is based on an alleged failure to provide adequate security, and so the plaintiff must identify a statute or case that required the property manager to provide security-related measures. Absent a special relationship between the plaintiff and the property manager, the general rule is that "a person owes no legal duty to assist or warn another person who is or may be in danger,"[16] and so the only source of such a duty is O.C.G.A. § 51-3-1. Because this statute applies to a property manager only if she is an occupier, arguing that a property manager is personally liable for her own tortious conduct is circular because it necessarily comes back to whether this statute applies to her, which in turn depends on whether she is an occupier.

This agency argument is essentially an argument for inverse vicarious liability. As Judge Story reasoned in *Poll*, a managerial employee could be jointly liable with her employer under O.C.G.A. § 51-3-1 for torts committed by her in the course and scope of her employment, even if she is not an occupier.[17] This reasoning is flawed because, once again, it assumes that the managerial employee owed a duty in the first place. The existence of a legal duty is crucial because, as explained above, conduct cannot be classified as tortious if there was no statute or case law prohibiting it. Again, there is no dispute that the management company is an occupier, and so it may have owed the tenant a duty under O.C.G.A. § 51-3-1, but that does not mean the property manager also owed the tenant a duty under O.C.G.A. § 51-3-1—in her personal capacity—merely because she was her employer's agent. An agent is not vicariously liable for her principal's torts. That would invert the correct rule of law, which is that a principal is vicariously liable for the torts of his agent.

The analytical difficulty may stem from this critical distinction: a property manager's conduct may be tortious with respect to the management company's potential liability as an occupier (because as a company, it can act only through its employees), but that same conduct is not tortious with respect to the property manager's potential personal liability (because she is not an occupier and, therefore, did not owe the tenant a duty). This is why a claim under O.C.G.A. § 51-3-1 does not involve a true vicarious liability scenario. For example, consider a motor vehicle accident caused by a company's employee who was driving while in the course and scope of his job duties. The employee obviously owed a duty to the driver and passengers in the other car, and his employer will be vicariously liable for his negligent driving. In negligent security cases, however, the duty is imposed directly on the occupier of the property, and the occupier's liability depends on its employees' conduct only because it must act through its employees. Liability in the case involving the motor vehicle accident is vicarious, whereas liability in the negligent security case is direct, even though the liability of both employers is based on the conduct of their employees. The difference lies in the source of the duty at issue in each case. The General Assembly has imposed a duty on all drivers to follow the rules of the road, and the doctrine of respondeat superior makes a driver's employer vicariously liable for his negligent failure to follow those rules. In contrast, the General Assembly chose not to impose a duty of ordinary care in premises liability cases on all people who work at an apartment complex. Instead, it imposed that duty only on owners and occupiers.

The issue discussed in this article does not arise frequently, at least in the author's experience, because most apartment complexes are owned and managed by Georgia companies and most property managers reside in the vicinity of their complex. That, combined with the fact that property managers are not likely to have substantial personal assets and are likely to be covered under the same insurance policy that covers the owner or the management company, makes it unnecessary for plaintiffs to sue them. However, when this issue arises, it is very important because removing a case to federal court or transferring a case to a more favorable venue could be outcome determinative. While there is conflicting authority on this issue, the correct rule should be that a property manager employed by a management company that has a contract for property management services with the owner of the property cannot be personally liable under O.C.G.A. § 51-3-1, as a matter of law, because she is not an owner or an occupier of the property, regardless of the degree of supervisory control she exercises in the performance of her job duties. ❖

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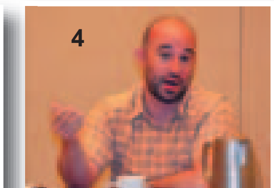
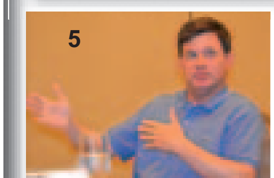
Endnotes

[1] *Anderson v. Atlanta Comm. for Olympic Games, Inc.*, 273 Ga. 113, 118 (2000).
[2] *Adams v. Sears, Roebuck & Co.*, 227 Ga. App. 695, 697 (1997) (en banc).
[3] *Coffer v. Bradshaw*, 46 Ga. App. 143, 148 (1932).
[4] *Total Equity Mgmt. Corp. v. Demps*, 191 Ga. App. 21, 22 (1989); *Food Giant, Inc. v. Witherspoon*, 183 Ga. App. 465, 467 (1987); *Scheer v. Cliatt*, 133 Ga. App. 702, 704 (1975); *see also Rhodes v. K-Mart Corp.*, 240 Ga. App. 57, 58 (1999) (noting that O.C.G.A. § 51-3-1 applies to "[a] person who maintains a place of business to sell goods or services").
[5] *See Ishmael v. General Growth Props., Inc.*, No. 1:14-CV-175-JRH, 2014 WL 7392516 (S.D. Ga. Dec. 29, 2014); *Hambrick v. Wal-Mart Stores East, LP*, No. 4:14-CV-66-CDL, 2014 WL 1921341 (M.D. Ga. May 14, 2014); *Parker v. Goshen Realty Corp.*, No. 5:11-CV-136-MTT, 2011 WL 3236095 (M.D. Ga. July 28, 2011); *Stephens v. Wal-Mart Stores East, LP*, No. 5:09-CV-325-CAR, 2010 WL 1487213 (M.D. Ga. Apr. 12, 2010); *Poll v. Deli Mgmt., Inc.*, No. 1:07-CV-0959-RWS, 2007 WL 2460769 (N.D. Ga. Aug. 24, 2007).
[6] *Hambrick*, 2014 WL 1921341, at *4 n.3.
[7] Black's Law Dictionary 1247 (10th ed. 2014).
[8] Webster's Third New International Dictionary 1561 (1993); *see also* Merriam-Webster's Collegiate Dictionary 858 (11th ed. 2003) (defining "occupy" as "to take or hold possession or control of").
[9] *Howard v. Gram Corp.*, 268 Ga. App. 466, 467 (2004) (en banc).
[10] *Id.*
[11] *Ga. Bldg. Servs., Inc. v. Perry*, 193 Ga. App. 288, 295 (1989) (holding that owner or occupier status "depends on whether or not [the person] had control of the property, whether or not [the person] has title thereto and whether or not [the person] has a superior right to possession of property which is in the possession or control of another") (quotations and citations omitted).
[12] *Ramey v. Pritchett*, 90 Ga. App. 745, 751 (1954).
[13] *See, e.g.*, *Poll*, 2007 WL 2460769, at *6-7.
[14] Premises liability cases provide a good example of this point because the nature of the duty owed to the plaintiff depends on whether the plaintiff is classified as an invitee, a licensee, or a trespasser. An owner or an occupier owes invitees a duty of ordinary care under O.C.G.A. § 51-3-1, but its duty to licensees and trespassers is only to avoid injuring them willfully or wantonly. This means that the failure to take certain security-related measures might be negligent with respect to an invitee but likely would not be willful or wanton (with respect to a licensee or trespasser). Thus, the same conduct by the owner or the occupier would be tortious with respect to one person but not another.
[15] *Rasnick v. Krishna Hospitality, Inc.*, 302 Ga. App. 260, 263 (2010) (internal quotation marks omitted).
[16] *Armor Elevator Co. v. Hinton*, 213 Ga. App. 27, 29 (1994); *see also City of Douglasville v. Queen*, 270 Ga. 770, 773 (1999) (holding that "[a] person is under no duty to rescue another from a situation of peril which the former has not caused").
[17] *Poll*, 2007 WL 2460769, at *6.

Spring Board Meeting Held at Wild Dunes





The GDLA Board of Directors traveled to Wild Dunes Resort on the Isle of Palms, S.C. for its Spring Meeting, April 24-26, 2015.

The weekend commenced with a reception in the hospitality suite, after which everyone took the boardwalk to a poolside dinner overlooking the ocean. The Board meeting was held on Saturday morning, leaving the afternoon free for everyone to enjoy the island resort's many offerings. Board members and their spouses and guests gathered again in the hospitality suite on Saturday evening for a reception before dispersing to dinner on their own.

The 2014-2015 Board members present were: **Executive Committee:** President Kirby G. Mason, HunterMaclean, Savannah; President-Elect Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; Secretary/Treasurer Peter D. Muller, Goodman McGuffey Lindsey & Johnson, Savannah; Immediate Past President Theodore (Ted) Freeman, Freeman Mathis & Gary, Atlanta; and Past President Lynn M. Roberson, Swift Currie McGhee & Hiers, Atlanta. **Vice Presidents:** Sarah B. (Sally) Akins, Ellis Painter Ratterree & Adams, Savannah; Craig C. Avery, Cowsert & Avery, Athens; and David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon. **Directors:** Brian T. Moore, Drew Eckl & Farnham, Atlanta; James D. (Dart) Meadows, Balch & Bingham, Atlanta; Jason D. Lewis, Chambless Higdon Richardson Katz & Griggs, Macon; James W. Purcell, Fulcher Hagler, Augusta; Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick; James S.V. Weston, Trotter Jones, Augusta; and Wayne S. Melnick, Freeman Mathis & Gary, Atlanta; **Past Presidents:** N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Edward M. (Bubba) Hughes, Callaway Braun Riddle Hughes, Savannah; and Walter B. McClelland, Mabry & McClelland, Atlanta. Also present was **Executive Director** Jennifer M. Davis.

At press time, the minutes had not been approved; upon approval, they will be posted with prior Board meeting minutes in the Members Only section of our website. ❖

Scenes from the weekend *(l-r): 1. Past President Bubba Hughes, Past President Walter McClelland, Cindy Bitting, Kathy McClelland, then-Vice President Sally Akins, Debbie Hughes, Dale Akins and Past President Staten Bitting gather for dinner on Saturday. 2. Vice President Craig Avery, then-President Kirby Mason and then-Secretary/Treasurer Peter Muller visit at the hospitality suite. 3. The group enjoyed dinner on Friday poolside overlooking the ocean. 4. Board members Brian Moore and 5. Jamie Weston make a point during the meeting on Saturday. 6. Past President Staten Bitting visits with Board member Jeff Ward at the opening reception. 7. Past President Ted Freeman talks with Board member Dart Meadows before dinner.*

GDLA Joins the Legal Food Frenzy

For the first time, the GDLA joined the 4th Annual Legal Food Frenzy (LFF), a food and fund drive jointly led by the Attorney General's Office, the State Bar of Georgia's Young Lawyers Division (YLD), and the Georgia Food Bank Association (GFBA).*

The friendly competition pits law firms, corporate legal departments, bar associations and legal organizations against each other in an effort to raise the most food (based on a per person average of attorneys and staff) to win the prestigious and highly-coveted Attorney General's Cup.

GDLA Diversity Committee Chair Candis Jones of Gray Rust St. Amand Moffett & Brieske in Atlanta coordinated the effort alongside committee member and Past President Lynn M. Roberson of Swift Currie McGhee & Hiers in Atlanta. Both designated their firms as drop-off locations for canned foods and checks during the competition, which ran April 20 to May 1, 2015.

The GDLA was encouraged to enter the competition by member Katie S. Dod of Merbaum Law Group in Alpharetta, who was serving as one of the YLD's LFF co-chairs.

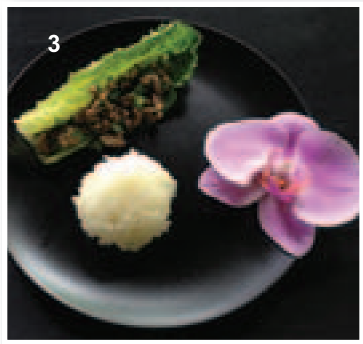
The statistics about hunger in our state are staggering: 1 in 5 Georgians are food insecure, meaning they do not always know where they will get their next meal; 1 in 4 children live in food insecure households; weekly, 156,500 unique clients in Georgia are served by GFBA member food banks.

While we did not win the "legal organization" category this year, we raised $3,485 and 12 pounds of food—the combined equivalent of 13,940 pounds of food. Our contributions were part of the collective statewide effort that raised a total of $196,382.82 plus 13,358 pounds of food. That translates into 796,663 meals going to struggling families, seniors and children.

Thanks goes to the GDLA members and staff who donated. Look for the call to participate again next year! ❖

**The Georgia Food Bank Association is comprised of eight regional Feeding America food banks which collectively distribute more than 121 million pounds of food annually through a network of nearly 2,500 partner nonprofits with food assistance programs in all 159 counties in Georgia.*

GDLA Participates in MBLC Diversity Cook-off



1. Kevin Patrick (left) sets up with GDLA chefs, Paul Thompson and Lara Percifield, 2. Judge Wes Tailor samples an entry. 3. GDLA's delicious appetizer entry as plated.

The Multi-Bar Leadership Council (MBLC) held its 4th Annual Taste of MBLC Diversity Celebration & Cook-Off competition on Saturday afternoon, April 25, 2015, at Grant Park in Atlanta, despite threatening storms.

While we did not place in this year's competition, we still believe our dish was award-winning. Thanks goes to Lara Percifield of Mabry & McClelland in Atlanta, who repeated this year as our chef. She and her husband, Paul Thompson, created Laab (sometimes spelled Larb), a traditional northern Thai dish of cooked ground meat with fresh herbs and spices served on lettuce or cabbage leaves; they also prepared Thai sticky rice, cooked in a traditional bamboo steamer basket, and a homemade grapefruit ginger soda.

Our chefs were ably supported by Diversity Chair Candis Jones of Gray Rust St. Amand Moffett & Brieske and Kevin C. Patrick of Goodman McGuffey Lindsey & Johnson, both in Atlanta, who assisted with decorating our table to represent this year's competition theme, "One Community: Many Flavors."

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

Competitor bar associations were judged in three categories—appetizers, entrées and desserts. These real life judges channeled their inner celebrity food critic to pick the winners: Fulton State Court Judge Wesley Tailor, Rockdale Chief Magistrate Court Judge Phinia Aten and DeKalb Magistrate Court Judge Nora Polk.

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

GDLA & DRI Young Lawyers Hold Happy Hour at RiRa

Enjoying the DRI/GDLA joint mixer are: 1. Elizabeth Stell, Meagan Hansen, David Hansen, Mike DiOrio and Eddie Tarver; and 2. Jake Evans, Peyton Ethridge and Jason Wiggam.

The Young Lawyers Committees of DRI and the GDLA held a joint DRI/GDLA Young Lawyers Happy Hour at RiRa Irish Pub in Midtown Atlanta on May 7, 2015.

The event was organized by Brett Tarver of Insley & Race in Atlanta, and sponsored in part by the GDLA's Platinum Sponsor Engineering Systems, Inc. (ESI).

DRI members who have not been members of the GDLA within the past five years, and otherwise qualify for membership, are eligible for a free year of GDLA membership. See article on page 14. ❖

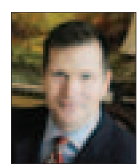
How to Choose a Good Mediator

Continued from page 26

It has happened to me countless times. I listen to each side's presentation at mediation and I think of a question or see an issue that neither side has considered before. That's because the parties often have tunnel vision. Litigators consider and present the facts in the most favorable light for their client.

As someone who is new to the table, and who has represented both plaintiffs and defendants, I can see the entire case from all sides. I'm also able to have credible discussions with the plaintiff, as well as the general counsel, risk manager or insurance professional, because I've stood in their lawyer's shoes many times before.

It is very important to choose the right mediator for the job. Litigating parties should take the time to step away from the case and objectively evaluate the obstacles to settlement. Resist the instinct to insist on a mediator from "your side." It may be that given the dynamics of your case, the opposite may in fact be needed, and hiring a mediator from "the other side" might actually be the key to getting your case settled. ❖



Scott Delius is a mediator affiliated with the National Academy of Distinguished Neutrals (NADN), in partnership with DRI, the national defense bar. The Georgia Academy of Mediators & Arbitrators, NADN's state chapter and a GDLA Platinum Sponsor, has over 70 members who can be found at GeorgiaMediators.org and on page 59. There mediators publish their available dates for the benefit of litigation departments. Mr. Delius has more than 18 years of experience litigating both sides of personal injury and workers' comp cases. He is a solo practitioner, an Afghanistan veteran, and a major in the Georgia Army National Guard.

GDLA Co-Sponsors Georgia Hispanic Bar Association's Judicial Reception

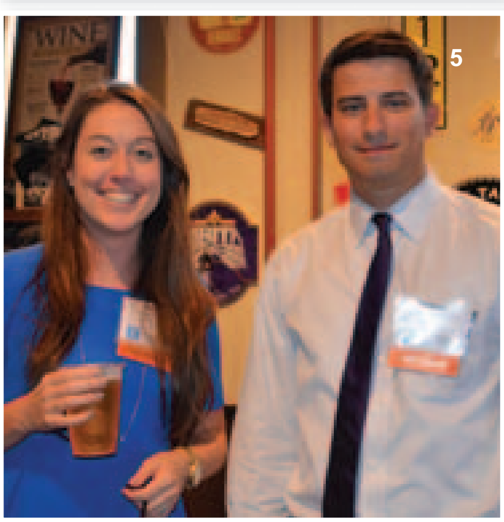
In our ongoing efforts to promote diversity, the GDLA was pleased to co-sponsor the Georgia Hispanic Bar Association's Judicial Reception on May 28, 2015, at Emory University School of Law.

The evening celebrated the appointment of Judge Dean Bucci as the first Hispanic to sit as a superior court judge in Georgia, serving the Paulding Judicial Circuit. DeKalb State Court Judge Dax E. Lopez and Robert A. Schapiro, Dean of Emory Law School, delivered opening remarks before Judge Bucci addressed the gathering.

GDLA Diversity Chair Candis Jones of Gray Rust St. Amand Moffett & Brieske in Atlanta was on-hand to offer congratulatory remarks on behalf of the GDLA. ❖

***Enjoying the evening are** (l-r): 1. DeKalb State Court Judge Dax Lopez. 2. Fulton Superior Court Judge Henry Newkirk, Past President Lynn Roberson, then-State Bar Treasurer Rita Sheffey and MBLC Past Chair Ana Maria Martinez. 3. Diversity Chair Candis Jones and then-MBLC Chair Yenniffer Delgado. 4. Court of Appeals Judge Chris McFadden, Fulton State Court Judge Jane Morrison and Kevin Patrick. 5. The honoree, Judge Bucci, with Paulding Chief Magistrate Judge Martin Valbuena and Sun Choy.*

Macon Networking Event Held at Just Tap'd



The GDLA held a networking happy hour at Just Tap'd in Macon on June 4, 2015. Initially planned as a young lawyers' gathering, it became an "all ages show" and even included summer law clerks. *Pictured at the event are (l-r): 1. Lauren Schultz and Wes Childs. 2. Will Horkan, Gene Hatcher and Will Davis. 3. David Anderson, Barrett Kirbo and Evan Barker—rising 3Ls at Mercer. 4. Dee Sams, Frank Butler and Tom Alexander. 5. Reneé Rainey and Michael Mayo. 6. Joe Stephens and Board member Jason Logan.*❖

WELCOME, Y'ALL! RECEPTION

PARTICIPATING SPONSOR

MILES MEDIATION & ARBITRATION SERVICES TEAM MURPHEY

The 48th Annual Meeting kicked off with the traditional Welcome, Y'all! Reception. Mother Nature squelched the beachfront venue with a massive storm, but that did not dampen anyone's spirits. All are identified left to right: 1. Jason Lewis, Jennifer Nelson and VP Dave Nelson with the evening's sponsors, Joe Murphey and Peggy Roth of Miles Mediation & Arbitration Services' Team Murphey—a Platinum Sponsor of the GDLA. 2. Dick Willis with Joe and Stephanie Sharp. 3. Jamie and Kristen Weston with their children, Spencer, Annie and Adair. 4. Andy Treese with his son, Calvin. 5. Alex Mason, Frank Mason, Taylor Mason, then-President Kirby Mason, Brad Harmon, Heather Harmon and Will Harmon. 6. Then-President-elect Matt Moffett and Dan Huff. 7. Sherrie Brady and Matt Barr. 8. Whitney Lay and Joey Greene.

HOTEL KEY CARDS

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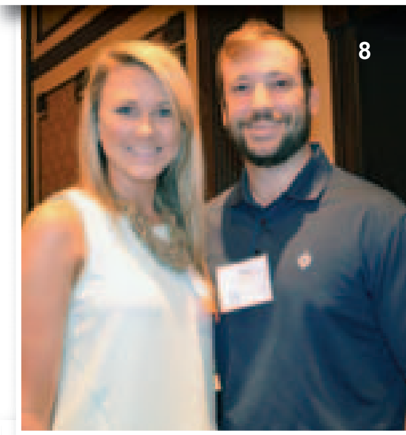
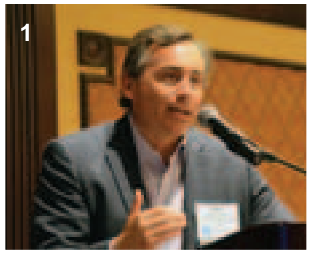
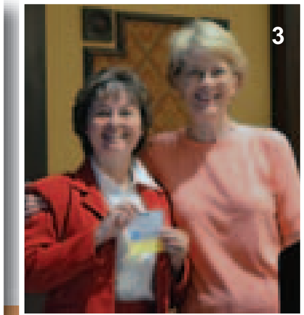
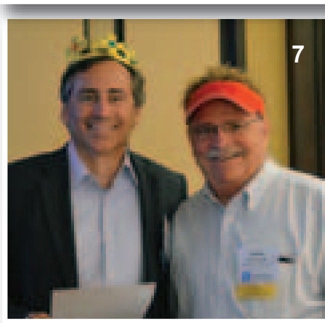


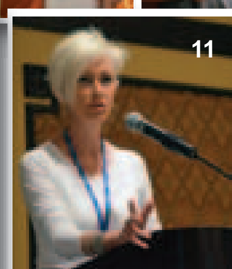
Hammock Beach Resort, June 11-14

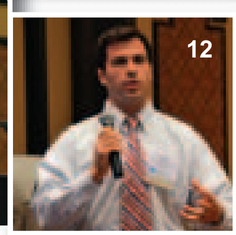
Scenes from the Business Meeting and CLE program, which was planned by (photo 1) then-incoming President Matt Moffett: 2. Outgoing President Kirby Mason is presented the DRI Award for Exceptional Performance by DRI State Rep and GDLA Past President Ted Freeman. 3. Past President Lynn Roberson (right) welcomes Kirby Mason to the Past Presidents' club. 4. The Young Lawyers Section held its second annual breakfast for early risers (l-r) Allison Escott, YL Chair Pamela Lee, Ben Avery and Jennifer Guerra. 5. Arguably the best professionalism program ever was masterminded by Fulton State Court Judge Susan Edlein along with her co-conspirator, Treasurer Sally Akins, second from left in photo 6. Standing with Judge Edlein and Ms. Akins in photo 6—albeit cleverly disguised—are (l-r) Past President Lynn Roberson, outgoing President Kirby Mason, Dick Willis and VP Craig Avery. Also part of the professionalism CLE skit were 7. incoming President Matt Moffett and Past President Bubba Hughes; 8. Past President Grant Smith (left) and Tommy Branch; 9. (l-r) Garret Meader, Past President Ted Freeman and Wayne Melnick. 10. Dan Huff discussed how to win a med-mal case before today's jury. 11. Carrie Christie offered guidance for managing a national practice. 12. Platinum Sponsor CED's Grant Bevill explained the anatomy of a slip-and-fall. 13. Rick Sager discussed the Toyota sudden unintended acceleration case. 14. Erica Morton presented tips to avoid hospital liens. 15. Shane Keith explored third-party criminal attack cases. 16. Dick Willis showed what lawyers can learn from Hollywood about cross-examinations. 17. Whitney Lay and 18. VP Jeff Ward covered the production and use of surveillance evidence.

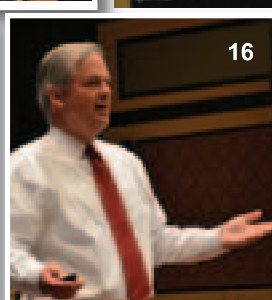


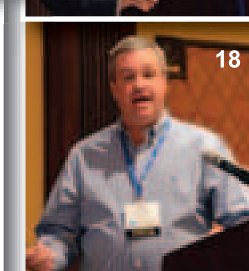












48th GDLA Annual Meeting

President's Reception

Participating Sponsor

Robson Forensic

Pictured at the President's Reception held on the Ocean Lawn are: 1. Justin Brumfield and René Basulto of Robson Forensic—the evening's sponsor and a GDLA Platinum Sponsor—with Past President Lynn Roberson and then-President Kirby Mason. 2. Then the incoming President and First Lady of the GDLA, Matt and Diane Moffett. 3. Tommy Branch and his son, Asa. 4. Past President Grant Smith and his wife, Holly. 5. Erica Morton with her husband, Robb, and their children, Tyler and Kaitlyn. 6. Jim Purcell (right) with his children, Mary Helen, Lydia and Charles, and wife, Annie. 7. Then-VP Sally Akins (right) with Jeff and Jodie Kidd of Collision Specialists, Inc., a GDLA Platinum Sponsor who sponsored the hotel key cards for the Annual Meeting.

Golf Tournament

Participating Sponsor

Engineering Systems, Inc. (ESI)

Scenes from Friday's annual golf tournament: 8. The winning foursome—Past President Staten Bitting, Andy Blum, Garret Meader and Dayne Grey. 9. VP Craig Avery, who coordinated the teams, and Tommy Branch. 10. Mitch Garber (third from left) represented ESI on the links, playing with (l-r) Art Davison, Sam Pittard and Charles Purcell. While their team didn't win, we thank GDLA Platinum Sponsor ESI for sponsoring the tourney. 11. Not sure why it wasn't rigged for Judge Edlein's team to win. That foursome included (l-r) her husband, Scott, Past President Grant Smith and Ben Avery.

Hammock Beach Resort, June 11-14

Tennis Tournament

Participating Sponsor

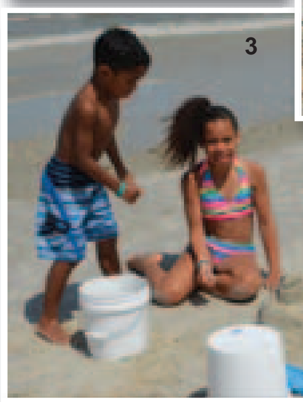
Esquire Deposition Solutions

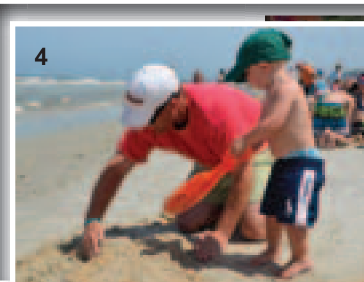
Saturday featured the annual doubles tennis tournament thanks to GDLA Platinum Sponsor Esquire. Pictured are: (front row) Joe Murphy, Peggy Roth, Holly Smith, Ali Avery, Sarah Avery Pittard; (back row) Esquire's Cliff Walker, Cathi Levinson, Esquire's Lauren Konton Shaw, ladies' winner Patti Singer, men's winner Sam Pittard, VP Craig Avery and John Leffler.

Sandcastles Contest

Participating Sponsor

Engineering Systems, Inc. (ESI)





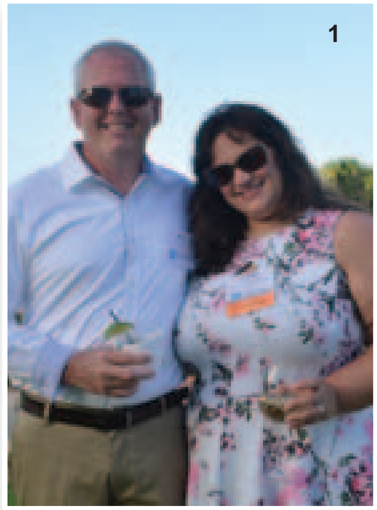
Thanks goes to GDLA Platinum Sponsor ESI for Saturday's fun in the sand. Just like with kids' sporting teams these days, everyone received a "trophy" in the form of a goodie bag. 1. First prize went to Brian Moore and his sons, Mason and Miller, for their shark. 2. Shane Keith's son, Wynn, works hard on his creation. 3. Sherrie Brady's children, Aaden and Saliya, start construction. 4. Will Avery helps his dad, Ben. 5. The entire Avery family—Katie with daughter, Amy, and Ben with son, Will—present their mermaid masterpiece. 6. The competitors gathered before the starting whistle. 7. Jon Wolfe's daughter, Maran, poses proudly beside her castle that featured a GDLA monogram. 8. Also cleverly using "GDLA" are Garret Meader's daughters, Katie and Ashleigh; Jamie Weston's daughter, Adair; Jeff Ward's daughter, Beth Anne; Eliza Meader and Annie Weston.

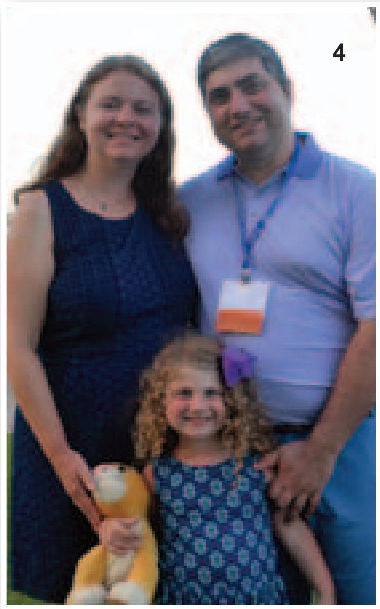
Closing Dinner

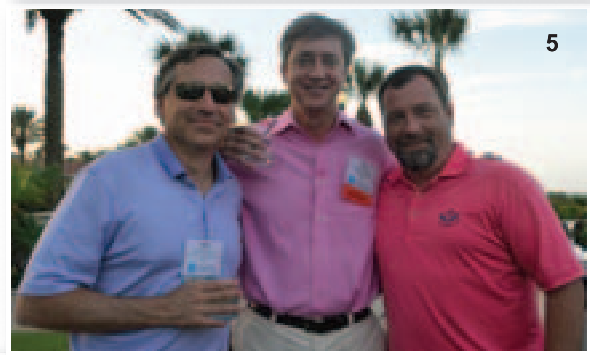
Participating Sponsor

FORCON International

Pictured at Saturday's Closing Dinner on the Grand Event Lawn are: 1. Jennifer Guerra and her husband, Mike Smith. 2. Wayne Melnick with his wife, Laura, and sons Joss and Xander. 3. Sherrie Brady with her mother, Sharon Herriott, and children, Saliyah and Aaden. 4. Marty Levinson with his wife, Kathi, and their daughter, Lexi. 5. (l-r) President Matt Moffett, Rick Sager and Shane Keith. 6. FORCON's Bill VerEecke (center), the evening's sponsor and a GDLA Platinum Sponsor, always holds a drawing for spirits from his world travels. This year's winners received wine from Portugal plus handcrafted wine bags from Iceland. Pictured are (l-r) Brad Harmon, Treasurer Sally Akins, Mr. VerEecke, Past President Ted Freeman and Frank Bedinger. 7. Past President Staten Bitting with his wife, Cindy, and their daughter, Libby. 8. Secretary Hall McKinley (left) with Ann Hopkins and FORCON's Bill VerEecke. 9. Chris Wolfe with his wife, Mary, and their daughter, Maran. 10. The Golden Isles Gang (aka Brunswick/St. Simons families) includes Greer Ward holding daughter, Mobley Grace, VP Jeff Ward; Kathy, Garret and Ashleigh Meader; in front are Katie Meader and Beth Anne Ward with Eliza Meader piggy-backing.







Save the Date

and join the fun

49th Annual Meeting

Omni Amelia Island, FL

June 9 - 12, 2016

50th Annual Meeting

The Breakers, Palm Beach

June 15 - 18, 2017

Hammock Beach Resort, June 11-14

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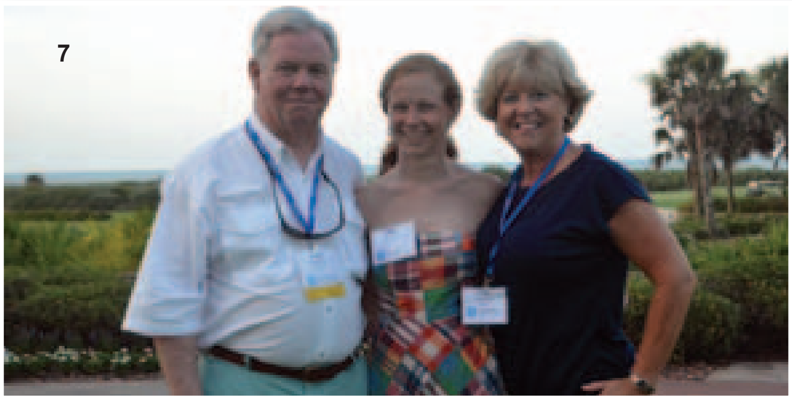

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*The **Executive Committee** is composed of the officers (President, President-elect, Secretary and Treasurer) and three most immediate Past Presidents. This year, the Nominating Committee, chaired by Past President Lynn M. Roberson, elected to separate the positions of Secretary and Treasurer, as allowed by the Bylaws. Previously, one person performed both functions.*

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**It is with great sadness that we report the passing of longtime Board member Rusty Gunn shortly before press time; we will have a tribute to him in the next newsletter. His seat will be filled by Board appointment.*

Continued from page 29

related to a combination of factors including the walkway surface, the footwear bottom, and the presence of foreign materials between them" (ASTM F1646).

The Significance of Tribometer Results: Four Elements

Apart from strictly comparative studies, the usefulness of a tribometer is only to the extent that it is correlated to human slips—because tribometers don't slip and fall. There are several key elements to using a tribometer (a machine) in an attempt to evaluate the walkway traction available to a human. These four elements are set forth below with discussion on each:

Element 1: Is there a reliable correlation between the tribometer's measurements and actual human slip experiences?

European government-backed entities have defined reference tiles that have "known" traction, based on human slip testing on ramps in conjunction with measurement using specific tribometers. The entities then require the use of specific tribometers capable of measuring these "known" reference tiles as having the "correct" value. Other such entities have done level-walkway *utilized COF* testing and then added a somewhat subjective "safety factor" to accommodate different pedestrian activities. The ANSI/TCNA A137.1 and ANSI/NFSI B101.3 standards rely on this research and certain associated tribometers.

Another method of correlation (not dependent upon specific tribometers) has been through the level-walkway slip research studies done at the University of Southern California. The research involved humans walking across four different standardized walkway tiles, with each having a different wet traction. The number of no-slips, heel-slips, and toe-slips on each tile was recorded—through this, the human test subjects ranked the surfaces for slipperiness, with statistical differentiation. Eleven tribometers were then tested on the same four walkway tiles to see if the tribometers could rank and differentiate the tiles in the same manner as had the humans.

This is a somewhat two-step concept: first, is the human subject testing reliable, and second, is the tribometry reliably correlated to that human testing?

Element 2: Has the tribometer undergone studies to evaluate how repeatable its measurements are—will it provide consistent measurements test after test?

A statistical evaluation of a tribometer's repeatability would be consistent with normal scientific practice. All measurement devices will have random and systematic error, and these measurement errors must be understood if assertions about the safety of a walkway are based on those measurements. Statistical analysis of repeatability may be done through repetitive tribometer measurements taken in one sitting by one operator. A large repeatability standard deviation points to significant variability in these measurements. Many tribometer models have not undergone a published repeatability study.

Element 3: Has the tribometer undergone studies to evaluate how reproducible its measurements are—from user to user and machine to machine?

Reproducibility evaluates the extent to which different operators and or different units of the same tribometer model will provide comparable results. The issue of reproducibility has relevance in litigation, as to whether other parties can "reproduce" the testing of one expert.

Many technical fields utilize an Interlaboratory Study (ILS) for evaluating both the repeatability and the reproducibility (together known as the "precision") of the test method. In the ILS, typically six to 30 independent labs will test the same samples; the labs should have different operators and different units of the test equipment. The reproducibility statistics will show the scatter of measurement results due to the variability between different operators and different units of the tribometer. A high value for the reproducibility standard deviation may reduce the "certainty" of the conclusions that can be drawn from analyses using that tribometer model. There is no "passing grade" with an ILS—the statistics are what they are, and some ILS results are never published because they are not considered to be favorable. Further, not all Interlaboratory Studies are equally rigorous—some entities shortcut the process.

Element 4: Was the tribometer used for a particular analysis operated according to the methodology applicable to the repeatability and reproducibility studies?

This ties the other three elements together. If the tribometer configuration is not the one correlated to human slips, or if the testing was conducted in a manner inconsistent with the ILS methodology, the foundations for assertions about a walkway's traction are compromised.

Conclusion

For courts deciding whether walkway traction analysis testimony should be accepted as reliable, there will be inertia and precedent set by past court findings wherein a methodology now known (by some) to be flawed was the "state of the art" at the time—compare *Phelps v. Stein Mart* (2011 U.S. Dist. Lexis 41121) with *Michaels v. Taco Bell* (2012 U.S. Dist. Lexis 140283) and *Kill v. City of Seattle* (2014 Wash. App. Lexis 2094). Even in the newer cases, however, the courts may have been misinformed (perhaps unintentionally) by the experts—this is a complex topic.

John Leffler, P.E., is a forensic mechanical engineer for FORCON Intl. in Atlanta. He is a standards author in the ASTM F13 Pedestrian Safety Committee, and Chairman of the ASTM E58 Forensic Engineering Committee. He is the lead engineering consultant to a tribometer manufacturer, and a lecturer at Georgia Tech. FORCON is a GDLA Platinum Sponsor.

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