Georgia Defense Lawyers Association
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GEORGIA DEFENSE LAWYER©

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It Says What It Means and Means What It Says:

Georgia Supreme Court Reaffirms the Proper Interpretation of Exclusions Contained in Insurance Policies

By Duke R. Groover, Lee M. Gillis, Jr. and Mary Beth Hand
James-Bates-Brannan-Groover Macon

In a case of first impression in the State of Georgia, the Georgia Supreme Court held on March 21, 2016, that personal injury claims arising from lead poisoning due to lead-based paint ingestion are excluded from coverage pursuant to an absolute pollution exclusion in a commercial general liability insurance policy covering residential rental property. The Court's ruling in *Georgia Farm Bureau Mutual Insurance Company v. Smith* formally established the method by which Georgia courts are to interpret absolute pollution exclusion clauses and reiterated the method by which the terms of an insurance policy are to be construed.[1]

In 2011, Amy Smith filed suit on behalf of herself and her minor daughter, Tyasia Brown, against her landlord, Bobby Chupp. Smith and Brown alleged in their complaint that at all times relevant to the lawsuit, lead paint was present on the premises owned by Chupp and the lead paint was "cracking, scaling, chipping, peeling, loose, and/or otherwise deteriorating, causing fragments, chips, flakes, and dust from the lead paint (the 'lead debris') to

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Inside This Issue

GDLA Elects Officers & Board

Outgoing President Matt Moffett (left) receives a gavel plaque in honor of his service from incoming President Peter Muller.

GDLA held its 49th Annual Meeting at the Omni Amelia Island Plantation Resort, Fla., from June 9-11, 2016, where members and guests enjoyed networking, golf, tennis, CLE, an exhibit hall and more.

During the annual members' meeting on Saturday, Cobb Superior Court Judge C. LaTain Kell, Jr., administered the oath of office, swearing in President Peter D. Muller of Goodman McGuffey in Savannah.

GDLA members unanimously accepted the report of the Nominating Committee, chaired by Past President Ted Freeman, thereby electing the 2016-2017 officers and Board of Directors. Highlights on pages 32-36.

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President's Message

It is hard to believe that GDLA was only 20 years old when I started practicing law (but not quite as shocking as when I realized that WWII had ended only 17 years before I was born). Already, the firm that hired me was a big proponent of GDLA. Shortly after I started work, I was given an application and told that I *would* join. *Every* litigator in the firm was a member of GDLA; it was *expected*. I was told about the strong relationships, and about the depth of knowledge and experience, but particularly about the annual meetings—the firm's associates made a point of saving up their budget dollars to earn a trip to the annual meeting.

I was not disappointed. One of my first trips was to The Homestead, and the people I met were engaging, interesting, supportive and fun. The CLEs were informative and the venue was great. I was hooked.

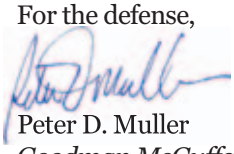
Fast forward to today, and so many of the Association's attributes still exist—the wealth of knowledge, the good people, the camaraderie. And yet, so much has changed over the years—for the better. We have made a concerted effort to capitalize on the benefits that technology provides for the exchange of ideas and the efficiency that it creates. We have expanded our membership significantly, and we have sponsored more activities to allow our members to participate in a variety of ways. Our members and our leaders have become more diverse as we strive to reflect and represent the attorneys who practice the civil defense that we love. Our newsletter has become a respected, substantive publication. GDLA has taken a more active role in submitting amicus briefs on significant legal issues. We have a strong base of sponsors who care about our Association and the relationships with members. These sponsors provide important financial support for our many endeavors.

As we approach 900 members, we would be naïve to think that GDLA can be all things to all members, and we would be unrealistic to think that it should. As GDLA has grown, and as the very defense practice has changed, we are provided with the opportunity to broaden our goals and the services that GDLA—and the members themselves—provide to the membership. We are blessed with an Executive Director who loves this organization as much as we do, and who takes the time (something that defense attorneys seem to have precious little of) and effort to think and execute proactively.

So as GDLA moves forward into its 50th year, I urge you to get involved in your own way, big or small, to make the Association even better and to reap your own benefits from it. Become involved in a Substantive Law Section that interests you—or seek to create one that matches your practice area. Enter your verdicts in our Verdicts Database. Contribute documents to the Current Legal Trends Database. Reply to e-blasts. Enroll in one of our academies, or lend your knowledge to help train others. Come to the annual meetings to enjoy the venues, to forge new relationships, and to see old friends. Meet the trial and appellate judges at our annual reception. Help foster our diversity efforts. Get published in our newsletter or journal or amicus briefs. Volunteer for leadership positions. *Make suggestions about how to make the Association even more relevant*.

One of my basic goals is to find ways to instill in members and law firms that lesson that I learned 29 years ago—we are *the* Georgia defense lawyers' association, and defense attorneys are *expected* to join. Regardless of specifically what you are looking for in your practice, GDLA can provide it to you. Our *members* can provide it to you. And you can give to them. ❖

For the defense,



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Goodman McGuffey, Savannah

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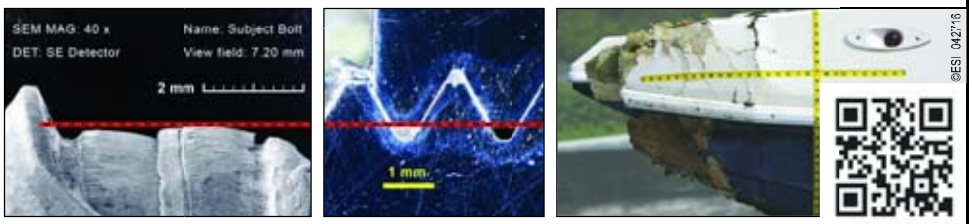
- Safety Assessments and Risk Analysis
- Software Reliability
- Water Strategies and Engineering
- Windstorm Investigations



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Member News & Case Wins

Member News

Hugh B. McNatt of *Balch & Bingham* in Atlanta was presented the Thomas O. Marshall Professionalism Award during the State Bar of Georgia Annual Meeting at the Omni Amelia Island in June. He was honored along with fellow recipient, Georgia Supreme Court Justice Robert O. Benham.

Gower Wooten & Darneille in Atlanta recently celebrated its first anniversary. The firm also announced the addition of **Sean Gill**. Mr. Gill previously worked at the City of Atlanta Law Department as a member of its federal litigation practice group, before going into private practice defending insurers and their policyholders. His practice focuses on wrongful death/personal injury and/or property damage in the context of motor vehicle accidents, premises liability and negligent construction, along with related coverage issues.

Ellis Painter Ratterree & Adams in Savannah recently celebrated its 20th anniversary. The firm also announced the addition of GDLA Past President **Edward (Bubba) M. Hughes**, **Dana F. Braun** and **Thomas (Tommy) E. Branch**. All three previously practiced with *Callaway Braun Riddle & Hughes*.

Zach Matthews has joined *McMickle Kurey & Branch* in Alpharetta as a partner. His practice focuses on transportation and general liability litigation, including construction defect and premises liability matters. Mr. Matthews is the chair of the GDLA Young Lawyers Section, as well as the Trucking Substantive Law Section.

Anam Ismail, formerly with *Waldon Adelman Castilla Hiestand and Prout,* has joined *Bendin Sumrall & Ladner* in Atlanta as an associate. She focuses her practice on general insurance defense, medical malpractice, professional liability, construction and healthcare law.

Jones Cork & Miller in Macon announced it has officially changed its name to *Jones Cork*. The firm also elevated **Renee S. Rainey** and **Hays B. McQueen** as partners. Both have practiced at Jones Cork since graduating from law school at Mercer's Walter F. George School of Law in 2010. Mr. McQueen's areas of practice include business and corporate law, business finance, public finance and commercial transactions. Ms. Rainey focuses on business litigation and insurance defense.

Continued on next page

GDLA President-elect **Sarah (Sally) B. Akins** of *Ellis Painter Ratterree & Adams* has joined the newly-opened Savannah office of Miles Mediation as a member of Team (Danny) Cohen. She will continue her practice with the law firm.

D. Jay Thaw, Jr., formerly with *MAG Mutual Insurance Company*, has joined *Bouhan Falligant* in Savannah. He will continue to focus on medical malpractice defense, as well as government affairs and business and professional liability defense.

Stephanie F. Brown, formerly a partner with *McMickle Kurey & Branch,* has joined the *Trial Division of Nationwide Mutual Insurance Company* in Atlanta. She focuses her practice on general insurance defense, automobile liability, commercial vehicle liability and premises liability.

Owen Gleaton Egan Jones & Sweeney in Atlanta announced that **H. Joseph Colette** has been named a partner. His civil litigation and transactional practice focuses on healthcare, governmental law, employment, real estate, business counseling and litigation, products liability, insurance coverage disputes and employee benefits, including retirement and pension plans. In 2014, Mr. Colette was appointed as a Special Assistant Attorney General for the Board of Regents for the University System of Georgia and the Department of Law of the State of Georgia by Attorney General Sam Olens. In 2015 and 2016, he was named a Rising Star by *Georgia Super Lawyers* magazine.

Brian R. Dempsey, formerly with *Freeman Mathis & Gary*, has joined the Atlanta office *of Quintairos Prieto Wood & Boyer,* a national commercial law firm with more than 350 lawyers in 19 U.S. offices providing representation in litigation, business, real estate and governmental law. Mr. Dempsey focuses his practice on public entity defense and appellate advocacy. QPWB is the largest minority and women-owned law firm in the country.

McAngus Goudelock & Courie, a regional insurance defense firm with 13 offices across North Carolina, South Carolina, Tennessee and Mississippi, has opened its first Georgia office in Atlanta with **John Campbell**, **Trula Mitchell** and **Thomas Sippel**. Mr. Campbell practices liability and commercial litigation with a focus on product liability, premises liability and business tort litigation. He has been a litigator for over 28 years, representing manufacturers, retailers, property owners, corporations and property and casualty insurance carriers. Ms. Mitchell focuses on workers' compensation defense. She spent three years in the claims department at Zurich US before joining MGC's Raleigh office in 1997. Mr. Sippel brings over 20 years of litigation and insurance defense experience to the firm, having most recently served as the managing attorney for the Georgia and Tennessee staff legal offices for The Hartford Insurance Group.

Lueder Larkin & Hunter announced the opening of a new office in Savannah in June. **Beverly G. O'Hearn**, formerly a partner with *Brannen Searcy & Smith* in Savannah, joined the firm as a partner. Her practice focuses on civil defense trial and appellate matters, including premises liability, automobile negligence, workers' compensation, general personal injury defense and commercial litigation.

Case Wins

James W. Scarbrough of *Mabry & McClelland* in Atlanta obtained a defense verdict on May 18, 2016, on behalf of the Metropolitan Atlanta Rapid Transit Authority (MARTA) after a two-day trial in Fulton County Superior Court before Judge Kelly Ellerbe. The jury took less than six hours to find MARTA driver Munir Foster did not cause a May 2013 collision with the driver of a motorcycle who died after striking Foster's MARTA paratransit van as the van made a left-hand turn on Panola Road in DeKalb County. Plaintiff's lawyer Michael Goldberg of Fried Rogers Goldberg asked the jury for more than $13.8 million in total damages during closing arguments.

On March 25, 2016, a DeKalb County jury returned a defense verdict in a medical malpractice case in favor of a local hospital and the neurosurgeon who operated on the plaintiff following a horrific car accident. Both the hospital and the defendant neurosurgeon were represented by **Terry Sullivan** and **Elizabeth Stell** of *Insley & Race*, as well as **Moses Kim**, who had recently left Insley & Race to start his own plaintiff's firm. The plaintiff was brought to the defendant-hospital after she was involved in a very serious motor vehicle accident. When she arrived at the hospital, she still had some movement in her extremities, but radiology reports showed she had multiple spinal fractures which necessitated surgery. Prior to her surgery, the plaintiff began experiencing numbness and tingling in one of her legs. The defense argued this numbness and tingling was a sign of an evolving spinal cord injury. After her spinal surgery, the plaintiff was a paraplegic, which the plaintiff argued was a result of the neurosurgeon's failure to use intraoperative neuromonitoring. However, the defense experts unequivocally testified that intraoperative neuromonitoring was not required by the standard of care and likely would not have altered the outcome. In closing, the plaintiff asked for a verdict "in excess" of $20 million. After a five-day trial and less than an hour in deliberations, the jury returned a verdict for the defense.

In April, **David C. Sawyer** of *Gray Rust St. Amand Moffett & Brieske* in Atlanta won a defense verdict in a breach of contract and negligent construction case before Judge Linda Hunter in the Superior Court of DeKalb County. The plaintiffs sued the defendant over a custom designed and built 750 gallon aquarium that they alleged was defective. Experts from both sides agreed there was nothing in the design or construction of the aquar-

ium that would make it uninhabitable for fish. The plaintiffs asked the jury for a verdict of around $180,000 in damages for the money they paid for the aquarium. The defendant also obtained a directed verdict on plaintiffs' claim for attorney's fees.

Callie D. Bryan, a partner with *Jones Cork* in Macon, recently obtained two favorable summary judgment awards in employment discrimination cases. In the first case, involving an employee who was a bus driver and a paraprofessional for a school district, Ms. Bryan's motion for summary judgment on behalf of the school district was granted in its entirety, dismissing the employee's claims for race discrimination under Title VII and for age discrimination under the Age Discrimination in Employment Act (ADEA). In the second case, a former employee of a local business filed claims for race and sex discrimination under Title VII and for discrimination pursuant to 42 U.S.C. § 1981, all of which were dismissed on summary judgment.

A federal jury in Jacksonville, Fla. returned a defense verdict on July 26, 2016, in favor of Dexter Hysol Aerospace and Henkel Corporation (as successor in interest). Defendants were represented by **Scott Masterson** and **Ashley Waller** of *Lewis Brisbois Bisgaard & Smith's* Atlanta office and local counsel in Jacksonville. Following a three-week trial, the jury deliberated about an hour before rejecting the plaintiff's request for $11.4 million in damages and found that the defendants were neither negligent nor strictly liable as alleged by the plaintiff. The plaintiff claimed that the defendants negligently designed and failed to warn, and were strictly liable for, a defective design and failure to warn with regard to an asbestos containing aerospace adhesive product allegedly used by the plaintiff while he was in the U.S. Navy from 1968 - 1971. The plaintiff was diagnosed with mesothelioma and passed away during the pendency of the suit, which was filed in the fall of 2014. ❖

Rusty Gunn Award Presented

Picture above (l-r) are Past Presidents Jerry Buchanan and Mel Haas; award recipient Kyle Owenby; Rusty's wife, Brent, and sons, Robert and Sam. Below are Mercer Law School Dean Daisy Floyd with Messrs. Buchanan, Owenby and Haas.

The inaugural GDLA Rusty Gunn Award was presented on May 13, 2016, during the Mercer Law School senior dinner to Kyle C. Owenby, who truly embodied the award criteria:

> *The GDLA Rusty Gunn Award will annually honor a Mercer law student whose professionalism is his or her badge of honor, and who quietly leads with strength, intelligence and good humor. The recipient should be held in the highest regard by his or her fellow students and the faculty, and be someone whom others aspire to emulate.*

On behalf of the GDLA Board of Directors, President-elect Sally Akins worked with Mercer Law School to establish the annual award in memory of alumnus Robert R. (Rusty) Gunn II. Rusty was a long-time member of the GDLA Board of Directors, where he was respected as a quiet, effective, often behind-the-scenes leader.

Rusty dedicated himself to training the next generation of civil defense litigators by joining the GDLA Trial Academy faculty in 1997; he chaired it from 2000 through 2002, and then continued to return annually as a faculty member. He also co-chaired the GDLA Amicus Committee for many years.

In addition, while he was a gifted litigator, Rusty also founded a mediation firm, South Georgia ADR, serving the middle of the state. Rusty himself was a respected—and sought after—mediator, given his exceptional skill at bridging the divide between two sides, no matter how contentious the case. Rusty had the unique gift of calming the angriest of parties, which resulted in countless amicable resolutions before trial.

In 2013, Rusty was diagnosed with cancer and began the battle of his life. He lost that fight in 2015. His loss to GDLA, and the greater legal community, is immeasurable. Because of the devotion he had to our organization, and our respect for him, the GDLA Board of Directors unanimously voted to honor his memory in this way.

GDLA Past President Jerry A. Buchanan made the award presentation during the event. ❖

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Welcome, New GDLA Members

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

John Anthony Beck, Jr.
Drew Eckl & Farnham, Atlanta

Thomas Peyton Bell
Carlock Copeland & Stair, Atlanta

John Campbell
McAngus Goudelock & Courie, Atlanta

William F. Carter, III
Savell & Williams, Atlanta

Tina Cheng
Nall & Miller, Atlanta

Daniel Crumby
Hall Booth Smith, Atlanta

Christina McMahon Curreli
Chambless Higdon Richardson Katz & Griggs, Macon

Michael DiOrio
Carlock Copeland & Stair, Atlanta

Charles Elton DuBose
Stewart Melvin & Frost, Atlanta

Damon E. Elmore
Nowell Sparks, Atlanta

Christopher Fairchild
Hall Booth Smith, Atlanta

Celeste Noelle Gaines
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Jonathan Gibson
Drew Eckl & Farnham, Atlanta

Matthew Grattan
Freeman Mathis & Gary, Atlanta

Michael C. Gretchen
Fellows La Briola, Atlanta

Benjamin Harbin
Young Thagard Hoffman Smith Lawrence & Shenton, Valdosta

Alaina Selby Howard
Nationwide Insurance Trial Division, Atlanta

Lisa Nicole Higgins
Drew Eckl & Farnham, Brunswick

Jeffrey Huong
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Ryan M. Ingram
Moore Ingram Johnson & Steele, Marietta

Harry Christopher Jackson
Drew Eckl & Farnham, Atlanta

Jill H. Jenkins
Ellis Painter Ratterree & Adams, Savannah

Tony Christopher Jones
Galloway Johnson Tompkins Burr & Smith, Atlanta

Kristin Elizabeth Malcolm
Insley & Race, Atlanta

M. Ann McElroy
Swift Currie McGhee & Hiers, Atlanta

Trula Mitchell
McAngus Goudelock & Courie, Atlanta

Alan F. Pryor
Balch & Bingham, Atlanta

Beau Tillman Shrable
Cooper Shrable & Cooper, Albany

Amanda Wilson Speier
Taylor English Duma, Atlanta

Charlotte Elizabeth Stell
Insley & Race, Atlanta

Zachary Arthur Taft
Drew Eckl & Farnham, Atlanta

Victoria Ashley Waller
Lewis Brisbois Bisgaard & Smith, Atlanta

Thomas Whitley
Drew Eckl & Farnham, Atlanta

Teri Zarrillo
Goodman McGuffey, Atlanta

GDLA Verdicts Database: Enter Your Cases

We recently launched a Verdicts Database in the members' only area of our website (look for it in the right navigation once you log in). **Please take time to enter your own verdicts back to 2010, regardless of outcome,** so this becomes a robust resource for the civil defense community. There are directions for inputting verdicts on the page, and you will see it is searchable in a variety of ways, including by venue, judge, expert, plaintiff's and defense lawyers, etc.

GDLA Files Amicus Brief on "Removal" Procedure Provided by Corporate Venue Statute

On June 17, 2016, GDLA filed an amicus curiae brief in the Supreme Court of Georgia in the case of *Pandora Franchising, LLC v. Kingdom Retail Group, LLP*, concerning interpretation of the "removal" procedure provided by the corporate venue statute, O.C.G.A. § 14-2-510. Specifically, the appeal centered on whether a corporation with a place of doing business in Georgia, but having its national or worldwide headquarters outside the state, could take advantage of the "removal" provision under the statute. O.C.G.A. § 14-2-510(b)(4) provides that in a case where venue as to a corporation is based solely on the place where the tort, wrong, or injury was done, "the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business."

The underlying case was filed by Kingdom Retail Group in Thomas County and Pandora Franchising, relying on O.C.G.A. § 14-2-510(b)(4), "removed" the case to Gwinnett County, where the company's registered agent and registered office within Georgia are located. Kingdom filed an "objection" to the removal in Thomas County, and the trial court declined to return the case to Thomas County. The Court of Appeals granted Kingdom's application for discretionary review, and in *Kingdom Retail Group, LLP v. Pandora Franchising, LLC*, 334 Ga. App. 812 (2015), the Court of Appeals reversed, holding that non-Georgia corporations are not permitted to utilize the removal procedure of O.C.G.A. § 14-2-510(b)(4).

Pandora petitioned the Supreme Court of Georgia for *certiorari*, which was granted. After a request from Pandora's counsel, GDLA filed an *amicus curiae* brief in the case to weigh in on the proper interpretation of the "removal" provision under O.C.G.A. § 14-2-510(b)(4). In its brief, GDLA contended that the Court of Appeals had ignored the plain meaning of the statute and the obvious intent of the legislature in including the removal provision. Specifically, GDLA explained that the Court of Appeals had conflated the language "the county in Georgia where the defendant maintains its principal place of business" in O.C.G.A. § 14-2-510(b)(4) with the question of what constitutes a corporation's "principal place of business" for purposes of "determining questions of residency and jurisdiction." The Court of Appeals' interpretation of the statutory provision rendered the words "in Georgia" mere surplusage.

GDLA contended that only one reasonable conclusion can be drawn from that language, and it is not the one in the Court of Appeals' opinion in this case.

Indeed, as GDLA's brief pointed out, had the General Assembly intended that the statute only apply to Georgia-based companies as the Court of Appeals held, there are a number of different ways O.C.G.A. § 14-2-510(b)(4) could have been written. The statute could have provided, for example, that the defendant could remove the case "to the county where the defendant maintains its principal place of business, if the defendant's principal place of business is in Georgia." Or the statute simply could have permitted removal only "to the county where the defendant maintains its principal place of business." Instead, the legislature wrote the statute so that "where the defendant maintains its principal place of business" modifies "the county in Georgia." GDLA contended that only one reasonable conclusion can be drawn from that language, and it is not the one in the Court of Appeals' opinion in this case.

GDLA went on, in its *amicus* brief in this case, to explain the importance of ensuring that O.C.G.A. § 14-2-510(b)(4) is interpreted and applied correctly. The obvious purpose of including the removal provision within the statute was to permit companies with a business presence within the state to be tried "at home," where potential jurors would be familiar with the business and its impact on the community. It would make no sense to preclude corporations organized in another state but with a physical business presence within Georgia from taking advantage of the removal provision. To the contrary, that would eliminate the obvious incentive provided by the removal provision under the statute for out-of-state companies to maintain some part of their operations to Georgia or to be good corporate citizens within the state. GDLA identified numerous examples of companies based outside the state but with a large business presence within the state.

Venue is an important right in Georgia, and persons and companies sued in Georgia generally have a constitutional right to be tried by a jury of their neighbors and to be held to the standards of the community in which they operate and reside. For a corporation or limited-liability company, GDLA contended in its brief in this case, that is the primary place where it does business in Georgia, regardless of whether that place also serves as the company's national or worldwide headquarters.

This case remains pending in the Supreme Court. GDLA's brief was co-authored by GDLA member Kate Whitlock and Amicus Committee chair Marty Levinson, both of Hawkins Parnell Thackston & Young in Atlanta. The case is *Pandora Franchising, LLC v. Kingdom Retail Group, LLP*, Supreme Court of Georgia, Case no. S16G0490. All amicus briefs, including this one, can be found in the Members Only area under "Amicus Policy and Briefs" in the right navigation. ❖

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

How Business Court Can Help Resolve Your Cases

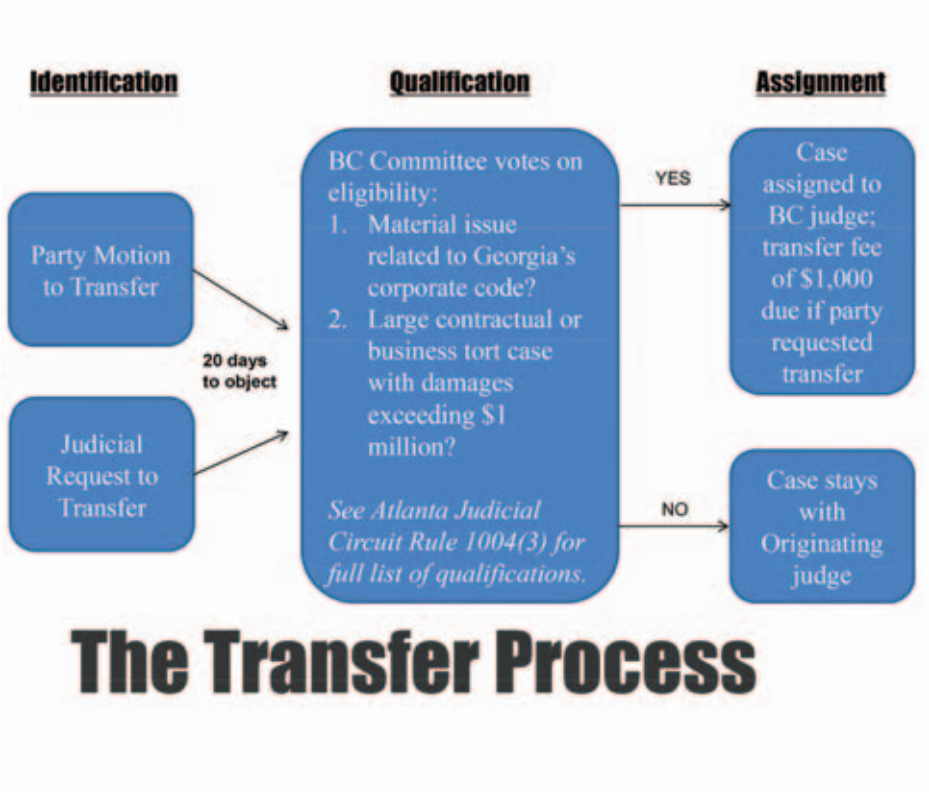
By Judge Randy Rich
Gwinnett Superior Court

How often has it happened that the resolution of your winning case has been delayed simply by the lengthy dockets at the courthouse? Normally, discovery takes considerable time. And, usually, it is time well spent. Some claims are dropped when they prove to be mistaken after discovery, and the good claims are tailored to meet the evidence which discovery has produced. Six months to a year of discovery has led to a case that now needs to be resolved. Summary judgment motions may be filed, and may be dispositive of even more of the claims. It is only then that you are put on a trial calendar for any remaining issues.

How fast the trial calendar moves is critical to the resolution of your case. Unfortunately, there are usually several obstacles. First, you are now at the bottom of the civil trial calendar. In superior court, you may be behind divorce cases, land use cases, or custody disputes. In state court, you may be behind credit card cases, garnishments, or landlord tenant disputes. To make matters worse, your civil trial may not be reached quickly due to the volume of criminal trials your judge must also hear. Generally, criminal trials take priority over civil trials because of speedy trial issues, or cases where the defendant has been in custody awaiting his day in court.

Business Courts May be an Answer

Business courts prioritize the resolution of complex civil disputes. In some states, a select few business court judges travel circuits in order to devote all of their time to the business court docket. In Georgia, the judges themselves accept the added caseload to their dockets and agree to devote the additional docket time necessary to resolve the disputes quickly. Fulton County also uses senior judges to assist with the extra docket time required.



Business Court is Not Just Business vs. Business

Business court was created to expedite business disputes with the idea that commerce, ongoing construction, or a complicated commercial transaction had to be resolved, despite the dispute, and the dispute needed to resolved as quickly as possible. However, other non-business complex cases will often also qualify for the expedited resolution. For example, with consent of all parties, a complex medical malpractice case involving multiple parties, Daubert or other complex issues, and at least $1 million in damages can qualify. Similarly, with consent of all parties, class actions, mass tort cases involving medical products, consumer products, and motor vehicle accidents where damages are at least $1 million can also qualify. Recently, a class action lawsuit involving insurance policies for high risk installment loans was accepted into the Fulton County Business Court.

Business Courts are Expanding in Georgia

In 2014, Superior Court Judge John Goger, who presides over the Fulton County Business Court Pilot Project, decided to see if the business court model, used successfully in Fulton County for over 10 years, could be expanded. "I thought Fulton had a great model (for resolving business disputes), and the rest of the state ought to have a chance to see if they wanted to adopt the model," he explained. Specifically he believed expansion in the Atlanta area would be a good place to start.

Shortly thereafter, the Metro Atlanta Business Court idea began to be discussed by several interested parties—leading business litigators, the State Bar of Georgia Board of Governors, and metropolitan Atlanta judges—to see if they could agree on a format to present to the Georgia Supreme Court for approval. The ideas included expanding the business court from exclusively superior court cases to include state court cases. Previ-

ously, no mechanism allowed a transfer of a complex business dispute filed in state court to superior court. It was determined that state courts would be allowed to opt in to the business court so no transfer would be necessary. Additionally, several metro Atlanta counties (state court and superior court) were offered the opportunity to opt into an expansion of the Fulton Business Court. Clerks of court and judges in these counties were consulted and advertisements to the local bar were published for input.

Metropolitan Atlanta Counties

Fortunately, metropolitan Atlanta had some judges who were already interested in Business Courts. Among those was Cobb Superior Court Judge Stephen Schuster, who is the current President of the American College of Business Court Judges (ACBCJ). In fact, the ACBCJ will have its next annual meeting in Atlanta.

In Gwinnett County, I started a pilot project for a Gwinnett Business Court in 2006. Gwinnett County State Court and Superior Court judges have already voted to join the expanded Metropolitan Atlanta Business Court. The expansion includes Gwinnett State Court with Judge Joseph Iannazzone, who is also an ACBCJ officer, volunteering to expedite the Business Court, and the Gwinnett Superior Court with me presiding. Cobb County Superior Court, Cobb County State Court and Fulton State Court are expected to reach a decision soon on possible expansion to their courts. In July 2016, the Georgia Supreme Court formally approved other courts to join the Metro Atlanta Business Court.

Lawyers Like Business Court

"We filed about 130 cases in Gwinnett State Court that involved rollover injuries with the Yamaha Rhino off-road vehicle. We felt that the cases would be best served by having one judge hear all of them, so the Business Court was a great solution," said Andy Childers, of Childers Schleuter & Smith in Atlanta. "The court allowed electronic filing, offered to have foreign witnesses testify live by video, and was readily available for hearings... . After about a year of discovery, and only one trial, we ended up resolving all of the cases."

"I thought Fulton had a great model (for resolving business disputes), and the rest of the state ought to have a chance to see if they wanted to adopt the model."

–Fulton Superior Court Judge John Goger

David Monde of Jones Day, who successfully defended the Yamaha lawsuit in Gwinnett, agreed it was helpful and efficient to have a judge whose focus was on the Rhino cases. "To get that one case ready for trial was not easy, but the ultimate outcome vindicated our client ... with a result that helped avoid additional trials and several years of litigation that would have very likely continued," Monde said.

Procedures and Factors to Consider

The expanded Business Court is relatively straightforward. Cases filed in state court stay in state court; the same for superior court. Business court judges rotate assignment of the cases as they are accepted. There is an increased filing fee which can range from $1,000 to $2,500. These funds cover the costs of senior judges and administrative expenses associated with the business court. Either party may make a motion for the case to be assigned to the business court, or the assigned trial judge will make the determination of whether the case may be considered. Most cases that qualify for business court consideration can be transferred over the opposing parties' objections. However, cases involving personal injury, wrongful death, employment discrimination, and consumer claims in which the aggregate damages are less than $1 million can only be transferred if all parties consent. Once the referral for consideration is made, a committee including judges and lawyers will score the case and vote on whether the case should be transferred. If the transfer is denied, the case remains with the assigned division for disposition. If the transfer is accepted, the expedited litigation process begins including accelerated discovery schedules and summary judgment motion deadlines. The business court judges often use technology (conference calls, e-mail pleadings and video conferencing) in order to expedite resolution of routine disputes that may arise during discovery.

Conclusion

I am excited that the business courts are expanding. In my experience, the expedited schedules help the lawyers quickly learn the merits of their cases. Often, this knowledge can help clients make the best choice on how best to resolve the dispute. Full details of the business court can be found on-line at https://fultoncourt.org/business/.❖

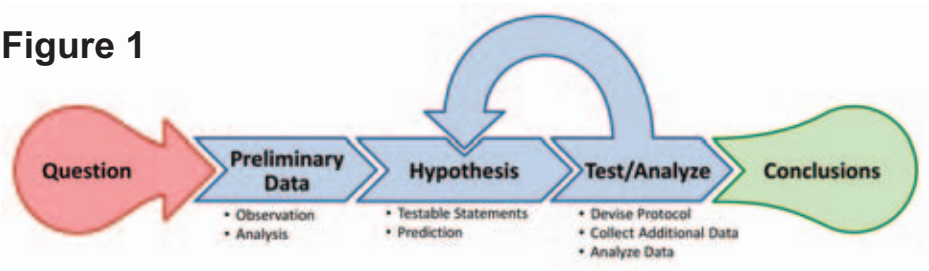
Hon. Randy Rich was appointed as a Gwinnett Superior Court judge in 2014 by Gov. Nathan Deal. A lifelong county resident and graduate of South Gwinnett High School, Judge Rich was elected to the state court bench in 2004. Prior to his judicial service, he was in private practice for 12 years in Gwinnett County.

The Scientific Method: It's Not Just for Science Fairs!

Analysis Methods in Biomechanics

By Amber Rath Stern, Ph.D., P.E
Engineering Systems, Inc. (ESI)

Figure 1



Scientific Method Applied to Accident Reconstruction

Biomechanical analyses have long played a role in vehicle accident investigation, typically by performing injury analysis and the determination of occupant kinematics and impact forces to the body. Here, we explain how the scientific method can be adapted to accident reconstruction from a biomechanical and human factors perspective, incorporating by reference various aspects of accident investigation and engineering analyses for the purpose of testing hypotheses.

Determining what happened in an accident to a reasonable degree of scientific or engineering certainty is driven by a process of accident reconstruction that utilizes biomechanics, injury analysis and human factors as critical analysis components. The process uses the scientific method as a framework for testing compatibility or consistency of different aspects of data or information that has been gathered about an accident (Fig. 1). Preliminary information provides context for understanding the general circumstances surrounding the accident, and guides the overall direction of scientific inquiry. From this information, hypotheses can be generated about specific occurrences or a sequence of events. Usually, these hypotheses are posed as "testable" statements (formulated as either a null hypothesis or in the affirmative) or as questions, where the answer meaningfully directs the analysis toward conclusion. Many times, answers are most useful when they are exclusionary, in that a specific event or sequence can be ruled out.

The most important step is 'testing' the hypotheses. In this step, a protocol or technique is devised that will identify and gather the appropriate data to either support or refute the testable statements, or answer the questions. In investigating accidents that have already occurred, these tests may be physical experiments and/or demonstrations of scientific principles, but routinely this is not a practical approach. This is particularly true in human injury analysis where physical experiments can be problematic or impractical. Instead, analyzing research literature (often regarding previously published physical experiments) and other sources of information is the most common way to test these hypotheses. Reasonable care should be used with witness data. In situations where the witness's version of events is in conflict with the laws of physics or the verifiable physical evidence, those aspects of the testimony must be rejected.

Data Organization

In utilizing the scientific method, a multitude of data from various sources is obtained in order to test the working hypotheses. To ensure it is useful and complete, this data must be organized and considered in a systematic way. One method is a modified Haddon matrix, where the 'man'-related data is separated into injury data and human factors data, and both are potentially modified by medical factors (Fig. 2). Data are separated into the temporal categories: "before," "during," and "after" the accident, if deemed appropriate for the specific accident reconstruction. The categories provided in the columns of Figure 2 are discussed further below.

Injury as Physical Evidence

The focal point of this method is using the 'man'-related data, and in particular the injuries, as physical evidence that must be reconciled in order to have an accurate accident reconstruction. The injuries (and other human interactions) in the accident are used as a signature of the where, how, and when the person was placed within the accident sequence. The biomechanical physical evidence can be just as essential as the other physical evidence gathered relating to the product/machine and accident environment (Fig. 2, Col. 1).

To apply this method, first the injuries are described by type, location, appearance, and severity from a review of the medical records (which may include review of X-rays, CTs and MRIs), photographs, witness statements, medical examiner reports and other similar sources. Second, the injury mechanism for each injury is determined. Injury mechanism information is often ascertained through comparison with specific data documented in the injury research literature. The mechanism provides information about the nature of energy transferred to the body (e.g. mechanical, thermal, electrical) and describes the specific method and means required to create the injury. For example, a spiral fracture of a long bone requires a torsional force component applied about the long axis of the bone. For a mechanically mediated injury, describing the body movements and the forces on and within the body that create the injury allows for an

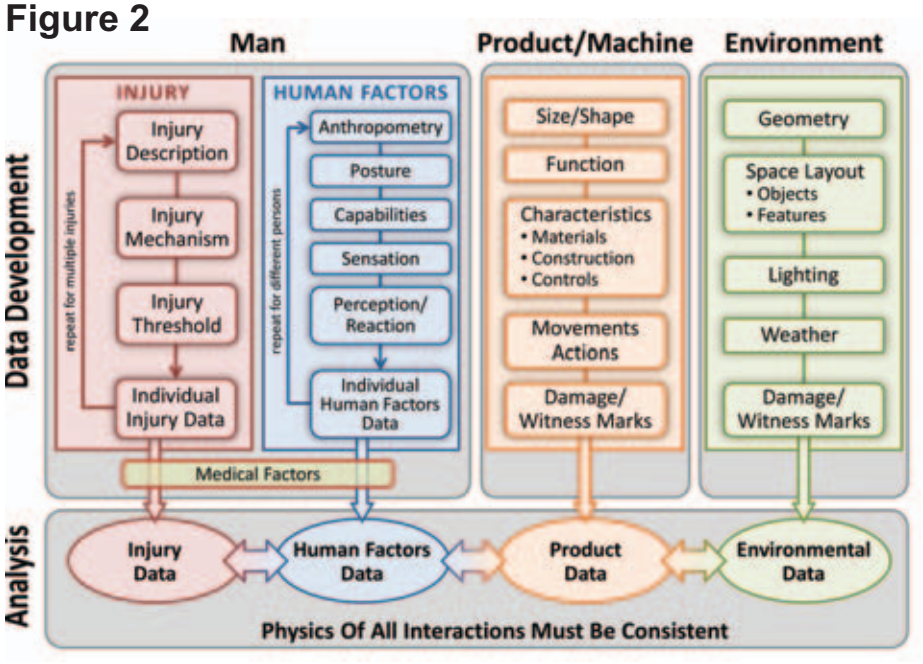
understanding of necessary physical interaction of the human body with the environment. Finally, determining the injury threshold or human tolerance for a particular type of injury can be important in accident analyses, since it provides context to the severity of the incident and the magnitude of force, acceleration, deflection etc. that typically produces injury. For many injury mechanisms, normal biomechanical tolerance has been established in the injury research literature, and provides a comparison to the specific injury or event being analyzed. In many cases, comparison of the accident exposure characteristics is made with biomechanical data from activities of daily living or voluntary human exposure research (*see* Medical Factors section below in situations where relevant pre-existing conditions/injuries exist).

In accidents where multiple injuries have been received, their pattern and distribution create a 'constellation of injuries' that can provide a unique insight to the accident. The steps are repeated for each injury, and those with similar mechanisms or locations are matched. Even what are typically considered minor or superficial injuries can provide important evidence to properly place a person in the reconstruction of an accident scenario.

Human Factors

Human factors data can be another critical component in the accident reconstruction. Human factors is a discipline that evaluates how people interact with their environment and encompasses physical and psychological aspects of human performance, capabilities, characteristics, and interfacing with tools, machines, and the environment. From an accident reconstruction perspective, this application is typically focused on the events leading up to and during the accident sequence in order to evaluate what and how it happened, and in some cases why (Fig. 2, Col. 2). Where appropriate, an individual's anthropometry should be identified, including one's

Figure 2



height, weight, and segment lengths, which are all aspects of physical evidence that are relevant for addressing a person's position, posture, and fit within the accident environment. Anthropometric and human factors data are available that describe a wide range of human measurements and provide context for accident specific evaluations. Surrogate studies are an additional means by which human factors considerations can be addressed.

Medical Factors

Important to note are medical factors that could be potential modifiers of both the injury and human factors aspects (Fig. 2, Col. 1 & 2). A person's health and/or medical condition may have a direct influence on their ability to resist trauma. The presence of disease or other pre-existing conditions, and the use of alcohol, drugs, or medications can have an impact on a person's physical capabilities as well as their sensory perception and reaction. In these situations, an aspect of the analysis may include a determination of potential exacerbating influences, and whether a particular event is a significant contributor to the existing condition. This determination must follow the same methods described herein. In these circumstances, the mechanism of injury must still be present (e.g. the appropriate direction of force, acceleration, etc.), and comparison of an event with reasonable activities of daily living may be useful.

Product/Machine and Environment

Similarly, data must be gathered about other accident circumstances in order to put the injuries and human factors into context (Fig. 2, Col. 3 & 4). The geometry and layout of the accident site create physical evidence in the form of constraints, boundaries and specific conditions (e.g. lighting, slip resistance). In accidents where products or machinery are involved, a description or knowledge of such things as the size, shape, materials, construction, controls, movement/action directions, speeds and other characteristics of the equipment is important to understand the potential human interactions. Particular attention is given to documenting the damage, failed components and/or witness marks that resulted from the accident. This gives key physical evidence about the nature of physical interaction between the man, machine and environment. A range of failure analysis techniques are available to determine these interactions. In cases involving

vehicles, the analysis can include a determination of the vehicle kinematics, as well as an assessment of the principle direction of force (PDOF) and velocity change (delta V) experienced. This information can then be used to determine occupant kinematics. It is not the intent of this paper to describe all the detailed analyses that are conducted on the product/machine or environment, but the data from these components is key to the accident reconstruction.

Test and Analysis of the Data

At the root of every accurate and complete accident reconstruction is consistency with the laws of physics and accounting for all the available physical evidence. When analyzing the data gathered and developed from the man, product/machine and environment, the physics of all interactions between and within these groups must be consistent. This is identified in the bottom row of Figure 2. By regarding the injuries as physical evidence, they become not just an outcome of the accident, but an additional component (resource) to use in testing accident reconstruction hypotheses. In situations where there are inconsistencies between the available information, one must side with the physical evidence. Where there are apparent inconsistencies in the physical evidence, the data must be reexamined to resolve them. In this sense, the process can be iterative.

By following this method, the biomechanical accident reconstruction conclusions are founded in science and consistent with the laws of physics. Not all reconstructions will lead to a single answer. The *available* data that are gathered or developed may not be able to exclude all possibilities but one. This is usually a function of the ability to gather or develop sufficient data for this purpose. These efforts still have tremendous value, since knowing what did not happen can be just as important as knowing what did happen. ❖

Amber Rath Stern, Ph.D., P.E., is a senior consultant for Engineering Systems, Inc. (ESI). Dr. Stern specializes in biomechanical analysis, determination of injury causation and injury mechanisms and mechanical engineering. She also has extensive experience in computational modeling, mechanical testing, failure analysis, measurement instrumentation, inquiry and analysis of national motor vehicle injury and vehicle crash databases, and experimental design. This article is adapted from the following peer reviewed publication; refer to it for additional details and case examples: Knox EH, Mathias AC, Stern AR, Van Bree MP, Brickman DB. "Methods of Accident Reconstruction: Biomechanical and Human Factors Considerations." Proceedings of the AMSE 2015 International Mechanical Engineering Conference and Exposition. *Houston, Texas: November 13-19, 2015.*

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A New Approach to Conflict Resolution

By Jennifer Grippa
Miles Mediation & Arbitration Services

How often have you seen a jury do something completely unexpected? As a trial lawyer, have you seen juries disregard contract provisions, make decisions based on empathy or make punitive decisions out of anger or distrust of the corporate conglomerate? All jurors bring some level of risk to litigation. All too often the fate of a client, its financial exposure, and the precedent the decision could create within the company is determined by 12 strangers, each with their own implicit biases and value systems. The risks inherent in litigation are all too real when it comes to a company's bottom line.

ADR can play a valuable role for corporate clients in evaluating disputes well in advance of trial. Mediation is a useful tool to assess your risks, look at evidence from a different perspective, size up your adversary, and get a neutral third party's insight on the strengths and weaknesses of your case. The more information you know, the better prepared you are before you turn the case over to a judge or jury for decision. Aside from settling a case, here are four benefits to keep in mind when talking to your client about why to mediate:

1. Looking at Evidence in a New Light. Listening and keeping an open mind during mediation helps you view your case from a different perspective, which can shape the way you handle the case. Hearing the other side's version of events may reveal facts or legal arguments you had not previously considered. What you thought was a minor piece of evidence or an immaterial witness may become more critical once you learn more about your adversary's strategic position. Looking at evidence in a new light can spark ideas on how best to defend a case or lead you to conduct discovery on issues you were either unaware of or had not thought about. Mediation can reveal facts or witnesses that clients may not have considered. And the mediation process can be useful in better understanding what expert testimony may be needed or how to best defend against the other side's expert. Taking the opportunity to view the case from your adversary's perspective and look at the evidence in a new light could change your client's strategy. You may also discover that there are fewer issues in dispute than initially expected, which helps you to narrow and focus the case for motions and/or trial.

2. Evaluating Your Opponent. While the discovery process allows you the chance to meet the opposing party during depositions, mediation provides another opportunity to gain deeper insight into your opponent. How reasonable is the opposing party? What is driving his or her decision-making process? Money? Emotion? Pride? Justice? Not only can opening statements in mediation give you a window into the opposing party's personality or motivations, but the other side's negotiating style and grasp of reality can be important to how your client makes strategic decisions. How is the other side valuing its case? What do they view as their best evidence or their strongest legal argument? Knowing this will shape your client's approach to a potential settlement.

Mediation can also be enlightening when it comes to sizing up the opposing counsel, how they communicate with their client, and whether they have a realistic view of the case and how a judge or jury may decide the dispute. Seeing how the other side views the case is important. It provides insight into key evidentiary issues and helps you better understand what motivates the opposing party, which aids your client in developing a settlement strategy. Even if a case cannot be settled at mediation, gathering more information about your opponent can only help you to better prepare to litigate the case at trial.

3. Gaining the Insight of a Third-Party Neutral. Bouncing the case off a third-party neutral helps your corporate clients gain insight from an independent and experienced professional. Evaluative mediators who can be frank with your client during private caucuses about the issues and the evidence can provide reactions to your client and communicate things you may not be comfortable telling your client yourself. Some advocates do not feel comfortable discussing weaknesses with their client for fear of being perceived as either not believing in the case or not being a fierce enough advocate for their client's position. Hearing it from an experienced third-party neutral can be more palatable for clients than hearing it from their own lawyer. Information gained during the mediation process can also help you refine your presentation of evidence, focus your arguments and better prepare you for trial.

4. Exposing Risk Factors. Mediation is a safe and confidential environment for clients to discover and assess the risks of their case. A knowledgeable and credible mediator can help your client understand what risks the client will face at trial. Likewise, the mediator will make sure your adversary is well aware of the risk factors in proceeding to trial. Assessing those risks and the impact they have not just on the case but the resulting business implications is valuable.

Corporate clients are particularly attuned to how the dispute will affect their business, beyond the time and expense of litigation. Understanding the risk factors can better position a client to appreciate their best and worse case scenarios at trial. At times, adverse decisions can be devastating to businesses beyond just the cost of litigation. Taking the

Continued on page 54

The Place for your Big Case...

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

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

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Obsolete Standards in Litigation: ASTM F462 for Bathing Surface Traction

By John Leffler, P.E.
FORCON International

In 1974, the Consumer Product Safety Commission ("CPSC"), National Bureau of Standards ("NBS") and American Society for Testing and Materials ("ASTM") began work to create a standard for bathing surface traction. This resulted in ASTM F462, released in September of 1979. At the time, this standard was a positive step forward, but over 36 years the shortcomings of this now long-obsolete standard have become increasingly evident. F462 remains the sole codified standard for bathing surface traction in the U.S., and it is frequently referenced in alleged bathtub fall incident cases.

This article will discuss the limitations of F462 and the use (and misuse) of the standard in claims resolution and litigation.

Summary of the Initial Timing of ASTM F462 and Related Standards

ASTM F462 was first released in May 1979. It has been reapproved without change repeatedly since then, most recently in 2007. It covers bathing surfaces, which include bathtubs and shower pans.

For years there were two codified standards for bathtubs—one standard for porcelain-enameled cast iron bathtubs and one standard for porcelain-enameled formed steel (sheetmetal) bathtubs. Specifically, the September 1979 version of ANSI/ASME A112.19.1 *Enameled Cast Iron Plumbing Fixtures* referenced F462. The 1984 revision (released in July 1985) of ANSI/ASME A112.19.4 *Porcelain Enameled Formed Steel Plumbing Fixtures* also referenced F462. These ASME standards are referenced by the U.S. Government (e.g., 24 CFR 3280.604, which regulates Manufactured Housing). The content of A112.19.4 was merged into A112.19.1 in 2008.

Federal Foundations of ASTM F462

In late 1973, ASTM's new F15.03 Subcommittee on Safety Standards for Bathtubs and Shower Structures began contacting bathing surface manufacturers at the direction of the also recently formed CPSC, towards an effort to address bathing surface safety through standards. In 1974, federal funding went to Abt Associates for an analysis of National Electronic Injury Surveillance System ("NEISS") bathroom incident data. However, this survey did not evaluate human traction *requirements*, nor the traction of incident-involved bathtubs. The findings of the Abt Associates report (regarding slip-resistance) listed as a stated goal that "to accomplish the desired level of performance, realistic test methods are badly needed".

The CPSC and NBS worked with the ASTM F15.03 committee from 1975-1977 to create what became the F462 standard.[1] Since a minimum traction threshold value was to be established, a couple of the decisions to be made were to choose a *tribometer* (traction testing device) and a *testfoot* material.

The recently designed (in 1975) NBS-Brungraber Mark I tribometer was chosen due to its combination of portability and ability to be calibrated across its measurement range. The Abt Associates report had called for finding a testfoot material that would simulate the heel and skin of a bare foot. After exploring several unsuitable options, Dow Corning's silicone rubber Silastic 382 (now long-discontinued) was chosen—though it has never been established that this surface realistically simulated a human heel.

Another stated goal within the Abt Associates report was to analyze "movement associated with accident sequences." This goal was not met, as the eventually chosen traction threshold value was not based on human slip research. The threshold value was chosen following *comparative* traction measurements (i.e., bathtub A versus bathtub B, not bathtub A versus human traction requirements) of 50 different bathing surfaces provided by various manufacturers in 1976, and tested with a single Mark I tribometer. Both porcelain-coated and plastic/composite products were tested. The threshold—a static coefficient of friction (SCOF) value of 0.04—was chosen simply to exclude those bathing surfaces on the market that had no slip-resistance traction/texture features at all. This traction threshold value, established in F462, will not assist the triers of fact with reliable information regarding the safety (to humans) of any particular bathing surface because it wasn't based on human testing.

Analysis of Competence of ASTM F462—Tribometer

The Mark I's test measurement performance is affected by the device's inherent operational friction; the design utilizes two sets of parallel stainless steel shafts upon which components slide. (*See* Figure 1). This parallel-shaft design is sensitive to manufacturing dimensional tolerances and manufacturing consistency, yet the manufacturing drawings for the Mark I (which date from 1975) were created without a thorough tolerance analysis. There are several other sources of variability in the design, and while the effect of these variabilities can be studied across a population of tribometer units, there is no evidence it was in the development of the Mark I. Further, to our knowledge, there has never been a published reproducibility study conducted with the Mark I.

A reproducibility analysis, conducted using an *interlaboratory study* (ILS), shows the statistical differences between measurements obtained by different operators using different units of the same test

device on the same test samples. An ILS can capture the variability introduced by differences in tribometer part dimensions, internal friction, operator technique and operator interpretations of the test method. Reproducibility statistics provide critical information as to whether the operator's measurements have a reliable relationship to (1) a standardized threshold value (e.g., 0.04 SCOF) or (2) measurements made by others.

The absence of ILS data for the Mark I means that the operator cannot know how his or her measurements relate to the measurements obtained in the 1976 comparative bathing surface study (the foundation for F462), or how his or her measurements relate to those of other operators. In litigation, depending upon venue, if an expert witness' analysis methodology cannot be "duplicated by others," the expert witness may be subject to a *Daubert* (or similar) challenge.

The inventor of the Mark I manufactured the device until about 1992 and retired in 2010. Neither F462 nor the manufacturer prescribed any particular maintenance or manufacturer calibration requirements for the tribometer. As such, the operational condition of all the 23-to 39-year-old Mark I tribometers in existence is unknown. Though F462 specifies the use of only the Mark I, there are forensic investigators who will use an alternative (non-Mark I) tribometer on a bathing surface and reference F462—often without competent expert opposition. But such methodologies are technically indefensible, as noted in the *Journal of Forensic Science*:

> The fact that the measurement of friction is a function of both the material being tested and the measuring system itself explains why several studies have shown that different devices yield different COF measurements for the same surface.[1]

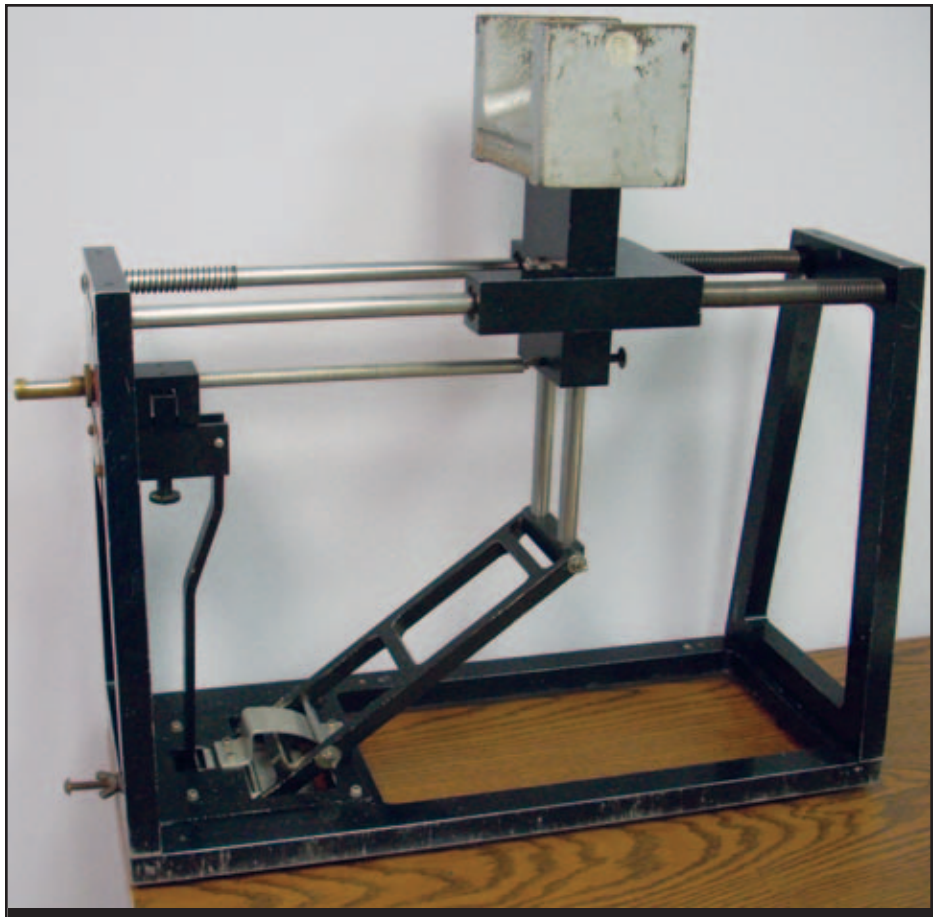

FIGURE 1: MARK I TRIBOMETER

Another issue with F462 testing is the required SCOF value of 0.04 in the context of the Mark I tribometer's ability to measure such low values. On a level surface, this tribometer doesn't actually function at a measurement value of 0.00, so the operator must offset the starting position of the device to a measurement of about 0.01 - 0.02. This represents the effective "zero" traction for the device. The F462 "acceptable" measurement of 0.04, therefore, represents a value just barely beyond this effective "zero" point on a measurement scale that goes to 1.00. The "passing" value is 2 percent higher than an unmeasurable value.

Over the decades, many of these issues have been brought up in negative votes against ASTM's periodic re-approval ballots for F462 (again unchanged since 1979). The standard is routinely and widely criticized, but it is the only current standard for bathing surface traction. On this topic, *Haney v. Marriott International, Inc.*, 2007 U.S. Dist. LEXIS 74872 (D.D.C. Oct. 9, 2007), may be of interest.

Other Forensic Considerations in the Context of Alleged Bathtub Slip Incidents

- Some properties have bathing surfaces older than 1979, predating the F462 traction requirement.
- If a subject bathing surface was subject to ASTM F462 at the time of manufacture, that standard does not require any particular level of slip-resistance beyond the period of the manufacturer warranty. Some bathing surface manufacturers exclude slip-resistance as being covered by their warranty.

Continued on page 41

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Government Enforcement Defense: Case Law Update

By Richard E. Glaze, Jr., Chai (left)r
Balch & Bingham, Atlanta, and
Scott R. Grubman, Vice-chair
Chilivis Cochran Larkins & Bever, Atlanta

As shown in the case updates below, the U.S. Supreme Court and Courts of Appeal have been active in cases that affect government enforcement. If you have questions about the cases or the underlying subject matter, please contact the author.

U.S. SUPREME COURT CLARIFIES KEY FALSE CLAIMS ACT ISSUE

On June 16, 2016, in a landmark decision, the U.S. Supreme Court unanimously upheld the validity of the "implied false certification theory" of False Claims Act ("FCA") liability and resolved a long-standing circuit split as to the scope of the theory's application. In overturning the First Circuit decision below, the Supreme Court in *United Health Services, Inc. v. United States ex rel. Escobar* held that FCA liability will attach to a defendant if, in submitting a claim for reimbursement to the government for services performed, the defendant fails to disclose noncompliance with a statutory, regulatory, or contractual requirement. Moreover, said the Court, liability for failure to disclose such noncompliance "does not turn upon whether those requirements were expressly designated as conditions of payment."

The *Escobar* case was brought by two qui tam relators under the FCA, which, among other things, makes it unlawful to knowingly present (or cause to be presented) a "false or fraudulent" claim for government reimbursement. "False" claims under the FCA can be either factually false or legally false. Claims are factually false when a claimant purporting to have provided a good or performed a service pursuant to a government contract "misrepresents what goods or services that it provided to the Government… ." Conversely, a legally false claim, though factually correct in terms of the goods or services provided to the government, is nevertheless false when the claimant knowingly falsely certifies that it has complied with a statute or regulation material to the government's decision to pay. In other words, a claim is legally false if a claimant knowingly fails to disclose a statutory, regulatory, or contractual violation, and knows that the government would not have reimbursed the claimant if such violation had been disclosed.

In *Escobar*, the relators argued that the claims at issue were false because the defendant healthcare provider had submitted claims for reimbursement to the Massachusetts Medicaid program even though the defendant had failed to disclose that certain employees did not have proper credentials or were not properly supervised. The crux of the relators' argument rested on the implied false certification theory—that is, even though the defendant had not expressly certified to the government that it would comply with the specific statutes and regulations at issue, the defendant had nevertheless implicitly certified compliance with these laws. Moreover, said the relators, compliance with these particular laws was a precondition to payment; had the government known about the defendant's noncompliance, it would not have paid out on the defendant's claims.

After concluding that the implied false certification theory was viable under the FCA, the Court moved on to the meatier issue: Whether, as the defendant claimed, the statute, regulation, or contractual provision with which the defendant had failed to comply must expressly state that compliance therewith is a precondition to payment. Under the defendant's theory (which had previously been adopted by the Second Circuit), FCA liability does not attach to a claim submitted for reimbursement unless the underlying statute, regulation, or contractual provision upon which the relators rely expressly

states that the claimant must comply in order to be paid by the government.

Ruling in the relators' favor (and siding with First, Fourth and DC Circuits), the Supreme Court held that in order for FCA liability to attach, a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be "material" to the government's payment decision. Indeed, "[w]hat matters is not the label Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."

Noting that the "materiality standard is demanding" and that materiality "cannot be found where noncompliance is minor or insubstantial," the Court moved on to parse out the FCA's materiality standard in the context of the government's decision to pay. As Justice Thomas states in the opinion, "the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." On the other hand, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material."

With its decision in *Escobar*, the Court keeps alive the implied false certification theory and also provides guidance to evaluate potential FCA liability pursuant to that theory. By laying the groundwork for application of the FCA's "materiality" standard in the context of government payment decisions, the *Escobar* decision has the potential to greatly influence the FCA landscape. Attorneys will want to keep a close watch on lower court interpretations and applications of the standard set forth in *Escobar*.

IMPORTANT ENVIRONMENTAL CASES ON WATER, AIR AND ENFORCEMENT COULD HAVE MEANINGFUL IMPACTS ON BUSINESSES AND INDIVIDUALS

Supreme Court Clips EPA's Wings in Clean Water Act Case

U.S. Army Corps of Engineers v. Hawkes, No. 15-290 (U.S. May 31, 2016); 578 U.S. _ (2016).

Four years after empowering recipients of U.S. Environmental Protection Agency (EPA) orders by allowing them to seek judicial review immediately, the Supreme Court doubled down on this decision and further expanded a regulated entity's right to have adverse EPA decisions reviewed in court in *United States Army Corps of Engineers v. Hawkes*.In *Hawkes*, the Court held that a Corps of Engineers "jurisdictional determination" ("JD") issued to a private landowner informing it that its land contained regulated wetlands was a "final agency action" and therefore could be challenged immediately in district court under the Administrative Procedures Act. The effect of the ruling was to require the landowner to obtain a permit to disturb alleged wetlands on the land before it could resume its peat mining operations. Before *Hawkes*, EPA's position was that the only options for a landowner who received an affirmative "JD" and wanted to use its land were to 1) obtain a permit to fill wetlands under Section 404 of the Clean Water Act or 2) ignore the JD and risk enforcement by EPA and the Corps. The latter choice could result in daily CWA penalties of $37,500 from the time the land was disturbed until EPA decided to resolve an enforcement action for the conduct, which could take years. As it had in *United States v. Sackett*, 132 S. Ct. 1367 (2012), four years earlier, the Supreme Court in *Hawkes* held that a landowner should not have to face this Hobson's choice and could seek guidance from a court instead. *Sackett* involved a landowner who had received an enforcement order from EPA that required the landowner to remedy the fill of alleged wetlands or face consequences similar to those that would be imposed on the landowner in *Hawkes*.

Although *Hawkes* and *Sackett* involved wetlands matters under the Clean Water Act, the effect of EPA orders can be similar under other statutes and courts may now be willing to provide opportunities to have EPA enforcement actions reviewed at this stage in the enforcement process. For a detailed look at the possibilities, see Rich Glaze's "A Detailed Look at the Effects of *Sackett v. EPA* on Administrative Enforcement Orders." *Environmental Law Institute News and Analysis*, 42 ELR 11030 (Nov. 2012).

Clean Water Act Jurisdictional Rule Stayed Nationwide

Order of Stay, *In re Environmental Protection Agency and Department of Defense Final Rule; "Clean Water Rule: Definition of Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015); State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al.*, Nos. 15-3799/3822/3853/3887 (6th Cir. Oct. 9, 2015).

On October 9, 2015, the United States Court of Appeals for the Sixth Circuit issued a stay of the Obama Administration's new rule defining the scope of federal jurisdiction under the Clean Water Act.[1] The stay postpones nationwide implementation of the Clean Water Rule, which a coalition of states argued would substantially expand the regulatory jurisdiction of the Clean Water Act and upsets the balance of federal-state collaboration in restoring and maintaining the integrity of the nation's waters.

EPA and the U.S. Army Corps of Engineers (Corps) developed the new rule in response to the U.S. Supreme Court's ruling in *Rapanos v. United States*, 547 U.S. 715 (2006), which cast doubt on existing EPA and Corps interpretations

Continued on page 52



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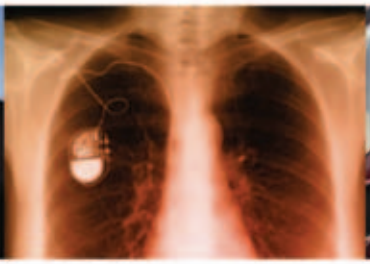


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Product Liability Case Law Update

By Alan Pryor
Balch & Bingham, Atlanta

PRODUCT DEFECT; FAILURE TO WARN; RES IPSA LOQUITUR; SPOLIATION: Plaintiff brought claims against the manufacturer and retailer for product liability, res ipsa loquitur, and negligence for injuries sustained when a package unexpectedly failed while she was handling it. Plaintiff also sought spoliation sanctions against the retailer for discarding the package. The trial court granted the manufacturer and retailer's motions for summary judgment and denied the plaintiff's motion for spoliation sanctions. The Georgia Court of Appeals vacated the trial court's decision on spoliation because the trial court improperly considered only whether the retailer was under actual notice of litigation rather than the broader inquiry of the facts and circumstances of the case. The trial court also erred in granting the retailer's motion for summary judgment on the plaintiff's negligence claim because the determination turned on the trial court's resolution of the spoliation question. The Court of Appeals affirmed summary judgment on the product liability and res ipsa claims because plaintiff failed to present evidence that the product was defective when it left the manufacturer's facility and because plaintiff failed to show the package was in the retailer's exclusive control.

***Sheats v. Kroger Co.*, 336 Ga. App. 307 (2016).**

Plaintiff Brenda Sheats sued The Kroger Company and Clayton Distributing Company, asserting claims for product liability, negligence and res ipsa loquitur. Plaintiff's claims arose out of injuries she sustained when the bottom of a cardboard package containing glass bottles suddenly opened when she lifted it, causing the bottles to spill out and injure her foot. Plaintiff sought spoliation sanctions against Kroger for failing to preserve the cardboard package.

After the incident occurred, a store security guard asked for the broken package. Plaintiff initially refused, stating she wanted to keep the package "as evidence." She later relented and turned the broken package over to the store manager. Plaintiff told the store manager what happened and complained of foot pain. The manager completed a "Customer Incident Report & Investigation Check List," which stated that the report was being prepared in anticipation of litigation under the direction of legal counsel. In his affidavit, however, the manager stated that he did not "get the impression" Plaintiff would sue. The manager inspected the package and the shelf where the package was displayed and observed that both were dry. The manager stated that, for reasons unknown, the glue on one side of the bottom of the package failed to stay glued to the other side. The manager recorded the package as a "lost" item due to breakage and discarded the package as refuse.

Both Clayton and Kroger filed motions for summary judgment, arguing plaintiff failed to submit evidence showing the package had been defective. Plaintiff filed a motion against Kroger for spoliation sanctions. The trial court granted Clayton and Kroger's motions for summary judgment on plaintiff's product liability, negligence and res ipsa claims. The trial court also denied plaintiff's motion for spoliation sanctions because plaintiff failed to provide Kroger with "actual notice" she was contemplating litigation.

The Georgia Court of Appeals vacated the trial court's denial of plaintiff's motion for spoliation sanctions. The Court observed that, for a party to pursue spoliation sanctions, the allegedly spoliating party must first be under a duty to preserve the lost or destroyed evidence. This duty to preserve is not limited to situations where the spoliating party receives actual or express notice of litigation. Rather, whether the duty is triggered depends on the

facts and circumstances, including the type and extent of the injury, the extent to which fault for the injury is clear, the potential financial exposure, the relationship and course of conduct among the parties, including past or threatened litigation, and the frequency litigation arises in similar circumstances. Because the trial court failed to apply this standard, the Court of Appeals vacated and remanded for the trial court to reconsider the spoliation motion.

Because of the unresolved sanctions issues, the Court of Appeals reversed the trial court's grant of Kroger's motion for summary judgment on plaintiff's negligence claim. Retailers owe consumers a duty to supply goods packed by reliable manufacturers and without imperfections that may be discovered with the exercise of the care, skill and experience of dealers in such products. Because Kroger discarded the package, plaintiff could not show the alleged defect in the package was reasonably observable. Should the trial court award spoliation sanctions, it could impose a rebuttable presumption that the lost or destroyed evidence would have been harmful to Kroger, *i.e.*, that the defect on the package was reasonably observable. Therefore, the question of Kroger's negligence could not be determined until the trial court resolves whether spoliation occurred and what spoliation sanctions would be appropriate.

The Court of Appeals affirmed the trial court's grant of summary judgment on plaintiff's product liability claims against Clayton and Kroger. To prevail on a product liability claim, a plaintiff must prove the product was defective when it left the manufacturer. Plaintiff presented no evidence the package was defective when it left Clayton's facility, and the prospect of spoliation sanctions did not apply to Clayton. Plaintiff's product liability claim against Kroger similarly failed because plaintiff presented no evidence that the package failed because of an original manufacturing defect as opposed to some other cause.

The Court of Appeals also affirmed the trial court's grant of Kroger's motion for summary judgment on plaintiff's res ipsa loquitur claim, which should be applied with caution and only in extreme cases. To prevail on res ipsa loquitur, plaintiff must present evidence that, among other things, the injury was caused by an agency or instrumentality within the defendant's *exclusive* control. The package had not been in Kroger's exclusive control: the package had been placed on a display shelf and was readily accessible to other customers. ❖

Workers' Compensation Case Law Update

By J. Benson Ward
Drew Eckl & Farnham, Atlanta

Roseburg Forest Products Co. et al. v. Barnes, S15G1808 and S15G1811, 2016 WL 3147567, __ Ga. ___ (June 6, 2016).

On June 6, 2016, the Supreme Court of Georgia ruled in favor of the appellant employers and insurers, and reversed the Court of Appeals of Georgia's 2015 decision of *Barnes v. Roseburg Forest Products Co. et al.*, 333 Ga. App. 273 (2015).

The genesis of the *Barnes* case was a 1993 accident resulting in an amputation of the claimant's left leg below the knee. At the time, the claimant was an employee of Georgia-Pacific, which was insured by Georgia Conversion Primary Insurance Company. His claim was accepted as catastrophic and he received TTD benefits. The claimant returned to light duty work at Georgia-Pacific in 1994, after he was fitted with a prosthetic leg. Accordingly, TTD benefits were suspended and Georgia-Pacific commenced PPD benefits until mid-1998.

In 2006, Georgia-Pacific sold the plant where the claimant worked to Roseburg Forest Products Company. The claimant continued working at the plant until a reduction in force in September 2009. Thus, notwithstanding his claim's catastrophic designation, the claimant subsequently worked for another 15 years. The claimant sought medical treatment for his knee in November 2009, and in December 2011 he was fitted for a new prosthetic leg, which treatment was paid for by the servicing agent for Georgia Conversion.

In August 2012, the claimant requested a hearing under the 1993 accident date, seeking recommencement of TTD benefits in his catastrophic claim. In November 2012, the claimant filed a claim against Roseburg and its workers' compensation insurer, ACE American In-

surance Company, alleging a fictional new injury based on his last date worked, September 11, 2009. At the hearing , the Administrative Law Judge denied both claims. The request under the 1993 catastrophic claim was denied as barred by the change of condition statute of limitation in O.C.G.A. § 34-9-104(b), and the 2009 fictional new injury claim was barred under the one-year statute of limitation contained in O.C.G.A. § 34-9-82. The Appellate Division of the State Board affirmed, as did the Superior Court of Dooly County.

The Court of Appeals disagreed on both issues. With respect to the 1993 claim, the Court of Appeals held that the request for recommencement of TTD benefits in the catastrophic claim was not barred by the two-year statute of limitations in O.C.G.A. § 34-9-104(b). The Court stated that "it is clear that the legislature intended to treat workers who received catastrophic injuries differently from workers who were less severely injured, allowing the former to receive benefits indefinitely so long as they remain catastrophically injured." As to the claimed fictional new injury in 2009, the Court held that O.C.G.A. § 34-9-82's one-year statute of limitations was tolled by the December 2011 medical treatment.

First, addressing the 1993 claim and the application of O.C.G.A. § 34-9-104(b)'s change of condition statute of limitation, the Supreme Court reversed the Court of Appeals and held that the claimant's request for additional TTD benefits was time-barred. The Supreme Court held that the change of conditions statute of limitations applies equally to catastrophic and non-catastrophic claims; a claimant has two years from the last payment of income benefits within which to file a request for additional TTD benefits.

While a claimant with a catastrophic injury such as Barnes has a *right* to receive weekly TTD benefits until he experiences a change in condition for the better, "O.C.G.A. § 34-9-104(b) makes clear that, in order for Barnes to *enforce* that right, he must make a claim for those benefits within two years of the last weekly TTD benefit payment made to him by his employer." *Barnes*, 2016 WL 3147567 at *2 (emphasis in original). The claimant waited far longer than two years before filing a claim to enforce his right, and so the statute of limitations barred his request.

The Supreme Court similarly held that the claimed 2009 fictional new

Continued on page 50

GDLA Wins Second Prize at MBLC Cook-off

1. GDLA's cook-off team: (l-r) Eddie Tarver, Candis Jones, Zach Matthews and Crystal McElrath. 2. Our chefs, Candis Jones and Zach Matthews, and 3. their award-winning dish. 4. Zach Matthews proudly displays our trophy.

The Multi-Bar Leadership Council (MBLC) held its Fifth Annual Taste of MBLC Diversity Celebration & Cook-Off competition on Saturday afternoon, April 23, 2016, at Grant Park in Atlanta.

Our entrée, Food Truck Southern Gyros, was awarded second prize! GDLA chefs Zach Matthews of McMickle Kurey & Branch in Alpharetta, who chairs our Young Lawyers Section, and Candis Jones of Gray Rust St. Amand Moffett & Brieske in Atlanta, who chairs our Diversity Committee, prepared everything for the delectable dish from scratch. Ms. Jones also decorated our table to match this year's theme, "Red, White and YOU."

Our chefs were ably supported by GDLA members Tynetra Evans of Gray Rust, Robert Johnson of Gower Wooten & Darneille in Atlanta, Crystal McElrath of Swift Currie and Eddie Tarver of Weathington Smith in Atlanta—all of whom helped with setup and clean up.

Competitor bar associations were judged in three categories—appetizers, entrées and desserts—with first and second prizes being awarded. These real life judges channeled their inner celebrity food critic to judge the culinary creations: Supreme Court Justice Harold Melton, Court of Appeals Judge Brian Rickman, DeKalb Superior Court Judge Courtney Johnson, Chief Fulton Magistrate Judge Cassandra Kirk and Duluth Municipal Court Judge Chung Lee.

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

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

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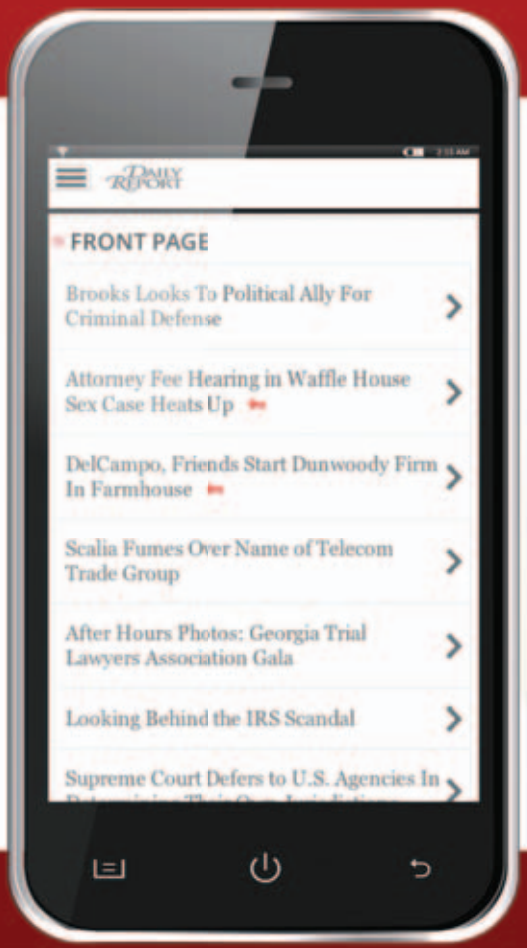

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49th GDLA Annual Meeting

Welcome, Y'all Reception

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The 49th Annual Meeting kicked off with the traditional Welcome, Y'all! Reception, sponsored by Miles Mediation & Arbitration Services' Team Wilson—a GDLA Platinum Sponsor. All are pictured left to right. 1. Then-VP Craig Avery, Miles Mediation's Tricia Stone and Wayne Wilson with then-President-elect Peter Muller. 2. Ty Brown, Past President Steve Kyle and then-President Matt Moffett. 3. Patti Singer and her husband, Past President Jimmy Singer, with Pat Fox and her husband, Past President Warner Fox. 4. Past President Ted Freeman and Bill Casey. 5. Joe and Christina Stephens. 6. Chris Lee with his daughter, Addison. 7. Wayne Melnick and Erica Morton. 8. Will and Fielding Martin. 9. Past President Mel Haas and Jason Logan. 10. Joe and Stephanie Sharp. 11. Zach and Tracy Matthews with Debbie and Jim Cook. 12. Executive Director Jennifer Davis with GDLA Platinum Sponsor Collision Specialists, Inc.'s Jodie Kidd, who sponsored the hotel key cards.

Hotel Key Cards

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Omni Amelia Island, June 9-12

Scenes from the Business Meeting and CLE program on Friday: 1. Cobb Superior Court Judge Tain Kell swears in President Peter Muller as his wife, Lisa, looks on. 2. At the Young Lawyers Breakfast are Leah Parker, Zach Matthews, Candis Jones and Ben Avery. 3. Then-Treasurer Sally Akins. 4. Outgoing President Matt Moffett receives the DRI Award for Excellence from DRI Regional Director Frank Ramos. 5. Chris Lee and Margaret Louttit. 6. Matt Moffett pays tribute to the late Rusty Gunn (see award article on page 7). 7. State Senate Majority Leader Bill Cowsert gives a legislative update and preview. 8. Philippa Ellis discusses jury trial strategies. 9. Past President Jerry Buchanan explores the future of the civil defense practice. 10. Amicus Chair Marty Levinson and 11. Vice-chair Garret Meader report on recent amicus briefs. 12. Edward Lindsey explains the role of a law firm's general counsel. 13. Zach Matthews provides tips on using social media to your advantage in litigation. 14. Courtroom Sciences, Inc.'s Dr. Melissa Loberg explains how to use science to your benefit during mediation.15. BAY Mediation's Scott Young offers best practices. 16. Judge Kell addresses professionalism. 17. Jason Willcox explores employment issues. 18. Exponent's Dr. Stacy Imler discusses rollover-activated air bags.

49th GDLA Annual Meeting

President's Reception

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Pictured at the President's Reception are: 1. Past President Salty Forbes and his wife, Lee; Past President Jerry Buchanan and his wife, Carolyn; Past President Staten Bitting and his wife, Cindy. 2. Past President Kirby Mason and DRI Regional Director Frank Ramos. 3. Chris and Pamela Lee; Tracy and Zach Matthews; Candis Jones and Demetrius Smith. 4. Ben and Katie Avery with their kids, Will, Amy (standing), and Caroline. 5. Lisa Muller with Past President Lynn Roberson. 6. Tracy O'Connell with Robson Forensic's Mark Williams and Justin Brumfield—the evening's sponsor and a GDLA Platinum Sponsor. 7. Ally Escott (right) with her sister, Molly Kittrell.

Golf Tournament

Participating Sponsor

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Scenes from Friday's annual golf tournament: 8. The winning foursome—Ben Avery, VP Jeff Ward, Bette McKenzie and Past President Mel Haas. 9. GDLA Platinum Sponsor ESI's Doug Locker, who sponsored (but somehow didn't win!) the tournament, Tommy Branch, Sam Pittard and Past President Walter McClelland.

Omni Amelia Island, June 9-12

Tennis Tournament

Participating Sponsor

Esquire deposition solutions

Saturday featured the annual doubles tennis tournament thanks to GDLA Platinum Sponsor Esquire. Pictured are (l-r) Resa Avery, Secretary Craig Avery, ladies' winner Patti Singer, men's winner Norm Pearson, Esquire's Cliff Walker, President Peter Muller, Lisa Muller, Ali Avery, Sarah Pittard and Sam Pittard.

Sandcastles Contest

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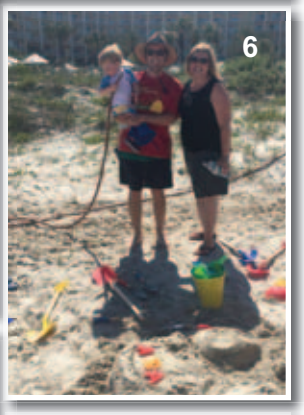

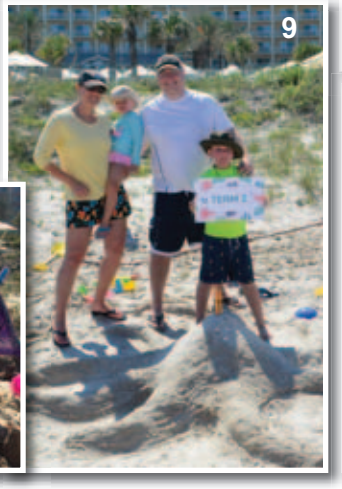

Thanks goes to GDLA Platinum Sponsor ESI for Saturday's fun in the sand. 1. Jon Wolfe's daughter, Maran, poses beside her castle featuring a GDLA monogram. 2. Ben Avery and his son, Will, crab race to earn building tools. 3. Garret Meader's daughters, Katie, Ashleigh (back) and Eliza, with Jeff Ward's daughter, Beth Anne, go for the tallest structure award. 4. Jason and Wendy Logan with their kids, Jason, Jr., and Lilly also compete for the tallest castle. 5. Shane Keith's kids, Wynn, Tanner and Landon created a porcupine. 6. Tommy and Sarah Branch with Asa, who was intrigued by the hose. 7. The Averys—Ben, Will, Caroline (in arms), Katie and Amy—created a pirate ship. 8. Lexi Levinson with her dad, Marty; Cami Tilkin; and John Farrish (kneeling) with his sons, Charles, Ben and Matthew cleverly used ESI's sponsorship sign. 9. The winning team for most creative with an octopus sandcastle: Erica Morton with her husband, Robb, and kids, Kaitlyn and Tyler. 10. Jason Lewis and his son, Carter, are ready for a cornhole defense win!

49th GDLA Annual Meeting

Closing Dinner

Participating Sponsor

FORCON International

1. Immediate Past President Matt Moffett with John Leffler of GDLA Platinum Sponsor FORCON, who again sponsored the closing dinner. 2. Judge Tain Kell and his wife, Sheri, with Ann Hopkins and Treasurer Hall McKinley. 3. VP Jeff Ward and Natalie Wilkes. 4. A trio of past presidents: Bubba Hughes, Ted Freeman and Jimmy Singer. 5. Past President Salty Forbes, Marty Levinson and VP Dave Nelson. 6. Past President Walter McClelland and his wife, Kathy (right) with President-elect Sally Akins. 7. Leah Fox Parker with her husband, Walter (left), and South Carolina Defense Trial Attorneys' Association President William Brown. 8. Tommy Branch and his son, Asa. 9. Immediate Past President Matt Moffett and his wife, Diane, celebrate the evening that officially signaled the end of his term in office.

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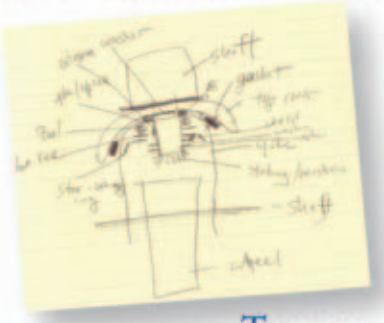

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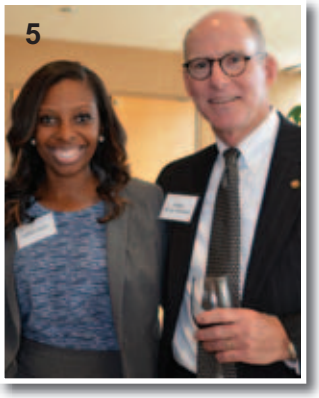
GDLA Sponsors Gate City/GABWA Annual Judicial Reception

In our ongoing effort to promote diversity within our association and the bar generally, GDLA was pleased again to be among the co-sponsors of the Annual Judicial Reception of the Gate City Bar Association and Georgia Association of Black Women Attorneys (GABWA) held on August 23, 2016, at King & Spalding.

Additionally, as has been previously reported, GDLA offers complimentary one-year memberships to eligible members of voluntary bars who are part of the Multi-Bar Leadership (MBLC), and who have not been a GDLA member previously. That includes Gate City and GABWA, among others. For a complete list of bars, see the article on page 30 (last paragraph). When applying online at gdla.org, prospects simply check the MBLC box to obtain the free year.

Pictured at the event are: 1. GDLA Past President Lynn Roberson, DeKalb State Court Judge Dax Lopez and Phi Nguyen. Ms. Nguyen is not only a GDLA member, but also serves as president of the Vietnamese American Bar Association of Georgia. 2. GDLA member Sherrie Brady with Chief Judge Gail Tusan and newly-elected Judge Belinda Edwards of Fulton Superior Court. 3. Atlanta Municipal Court Judge Chris Ward with GDLA member and Fulton Magistrate Court Judge Meka Ward. 4. GDLA member and GABWA Past President Adwoa Seymour with U.S. District Court Judge Steve Jones. 5. GDLA Diversity Chair and Gate City Board Member-at-Large Candis Jones with Fulton Superior Court Judge Henry Newkirk. 6. DeKalb State Court Judge Stacey Hydrick and GDLA Executive Director Jennifer Davis. 7. Supreme Court Justice David Nahmias and GDLA member Ty Brown. 8. GDLA member and Assistant Secretary on the Gate City Board Jatrean Sanders with Court of Appeals Judge Nels Peterson. 9. Ms. Jones gives welcoming remarks on GDLA's behalf. 10. GDLA member and Gate City Board Member-at-Large Damon Elmore with newly-elected Fulton Superior Court Judge Thomas Cox. ❖



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Obsolete Standards In Litigation: ASTM F462 for Bathing Surface Traction

Continued from page 21

- Given the above-referenced issues, and because F462 is the only codified method of testing bathtub traction in the U.S., the adequacy of an in-use bathtub's traction typically gets down to the question of reasonable notice:
  - If a property holder has not been made aware of a pattern of bathtub slips that cannot be linked to traction-unrelated issues (e.g., claimant intoxication), then he/she arguably does not have reasonable notice of a hazard. *See Billings v. Starwood Realty et al.*, 2006 U.S. Dist. LEXIS 65182 (N.D. Ga. Sept. 13, 2006).
  - Bathtub manufacturers do not publish recommendations for property holders to periodically analyze the traction of their bathtubs, nor methods for doing so. As such, the property holder likely does not have actionable reasonable notice that the installed bathtubs may over time lose their slip-resistance characteristics to the point of becoming hazardous.
  - If a property holder does not visually observe (through reasonable practices of inspection) that the slip-resistance traction features of a bathtub floor surface have "obviously" worn out, then he/she arguably does not have reasonable notice of a hazard. Complicating this is the previously mentioned fact that not all new "F462-compliant" bathtubs have observable slip-resistance traction features. And there is no objective method established in the industry to reliably verify that a bathtub's traction features have indeed "worn out."
  - If a property holder decides he/she wants to increase the traction of his/her bathtubs, there are a variety of options—e.g., sandblasting, chemical etchants and "sticky" coatings—all of which are advertised as effective by their manufacturers. Yet, the foregoing discussion points out that there is little relevant science behind the codified traction of *new* bathtubs, let alone refinishing methods. An understanding of such details is likely beyond the expertise of the average property holder.

Future Opportunities for Bathing Surface Safety Standards

Public safety would be better served by a more competent traction standard for bathing surfaces (i.e., a standard with a reliance on human slip research), but one of the reasons F462 has remained unchanged is the complexity of revising it properly. Such research would be time-consuming, expensive, and require support from both the federal government and bathing surface manufacturers. ❖

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This article is based on the upcoming paper by Mr. Leffler and Mark Blanchette, Ph.D., entitled "Forensic Considerations regarding Traction and Tribometry of Bathing Surfaces" and slated for publication later this year in the *Journal of the National Academy of Forensic Engineers Volume 33, Number 1.*

ENDNOTE

[1] CM Powers, et. al., Validation of Walkway Tribometers: Establishing a Reference Standard, J. Forensic Sci., 55(2) (2010).

Continued from page 1

be present on the Premises." Smith and Brown alleged that exposure to the lead paint and lead debris resulted in lead poisoning to Brown, which caused severe and permanent injuries.

Chupp submitted the claim to his insurer, Georgia Farm Bureau Mutual Insurance Company ("GFB"), under a commercial general liability ("CGL") insurance policy issued by GFB on the premises. GFB subsequently filed a complaint for declaratory judgment, arguing that because of the absolute pollution exclusion contained in the policy, GFB had no obligation to defend Chupp in the lawsuit brought by Smith and Brown and had no obligation to pay any judgment which might be rendered against Chupp in the lawsuit.

The GFB policy provided that GFB would "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' ... to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' ... to which this insurance does not apply." The policy also contained an absolute pollution exclusion that stated the insurance would not apply to: "'Bodily injury' ... arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants': (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured." "Pollutants" was defined under the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled or reclaimed."

Pollution exclusions were originally developed by commercial insurers in response to environmental regulations enacted by Congress in the 1960s and 1970s which exposed insurers to liability related to claims arising from mass environmental contamination. The first pollution exclusion clauses were directed specifically at environmental pollution claims.[2] In the mid-1980s, insurers revised the language of the exclusions in form CGL policies to encompass non-environmental pollution claims, which substantially broadened the exclusions' application.[3] The revised provisions, referred to as absolute pollution exclusions, extended the application of pollution exclusions beyond environmental claims to premises owned, rented, or occupied by the insured, and also expanded the number of chemicals regarded as pollutants by deleting the word "toxic" from the original language.[4] The pollution exclusion contained in the GFB policy was an absolute pollution exclusion.

GFB moved for summary judgment in the declaratory judgment action based on the pollution exclusion, arguing that lead met the definition of a pollutant as defined in the policy and that Brown's alleged injuries arose out of the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape" of the lead as required by the policy. The trial court agreed with both propositions and held that GFB was not obligated to defend or indemnify Chupp in the underlying lawsuit.

The trial court found that the Georgia Supreme Court's decision in *Reed v. Auto-Owners Ins. Co.*,[5] which addressed the construction of an identical pollution exclusion clause in a CGL policy insuring a rental home, was directly on point. The plaintiff in *Reed* sued her landlord for carbon monoxide poisoning allegedly caused by the landlord's failure to keep the rental home's furnace in good repair.[6] While carbon monoxide was not explicitly listed in the policy as a pollutant, the Georgia Supreme Court held that carbon monoxide gas fell within the policy's definition of a pollutant and concluded that the plaintiff's injuries stemming from the exposure to carbon monoxide were excluded from coverage under the pollution exclusion.[7] In determining that the pollution exclusion applied to the claims presented, the *Reed* court stated: "As all parties recognize, the question narrows as to whether carbon monoxide gas is a 'pollutant'—i.e., matter, in any state, acting as an 'irritant or contaminant,' including 'fumes.' We need not consult a plethora of dictionaries and statutes to conclude that it is. After all, the very basis for Reed's lawsuit is her claim that the release of carbon monoxide gas inside the rental house 'poison[ed]' her, causing her to suffer difficulty breathing, dizziness, insomnia, vomiting, nausea, headaches and decreased appetite. Accordingly, we agree with the Court of Appeals that the plain language of the pollution exclusion clause excludes Reed's claim against Waldrop from coverage under the CGL policy."[8]

Applying this same analytical framework to Smith and Brown's claims, the trial court concluded that lead, like the carbon monoxide gas in *Reed*, was a contaminant which met the definition of pollutant contained in the policy. "But for the type of pollution, *Reed* is directly on point. In her suit, Smith alleges that her daughter suffered lead poisoning and permanent injury from the ingestion of lead-based paint found on the premises she rented from Chupp. She further alleges that Chupp was negligent in preventing 'lead contamination' of the premises and failed to abate the 'lead contamination.' The policy does not cover bodily injury caused by 'actual, *alleged*, or threatened discharge, dispersal, seepage, migration, release, or escape of 'pollu-

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tants' … . Since Smith has alleged bodily injury from lead poisoning, this Court, following the *Reed* analysis, has no choice but to conclude that lead is a contaminant and therefore meets the definition of pollutant contained in the policy."[9]

The trial court then addressed the question of whether Brown's alleged injuries arose out of the "discharge, dispersal, seepage, migration, release, or escape of" lead, as required by the pollution exclusion. Recognizing that the question with respect to lead paint was one of first impression in Georgia and that other jurisdictions are divided on the question, the trial court found that the policy provision was unambiguous and that the ingestion or inhalation of chipping or flaking lead paint qualified as a discharge, dispersal, release, escape, seepage, or migration of a pollutant.

The trial court stated: "Smith's suit alleges that the paint in this case 'was cracking, scaling, chipping, peeling, loose, and/or otherwise deteriorating, causing fragments, chips, flakes, and dust from the lead paint … to be on the Premises.' Any of these methods of removal of paint from the surfaces in the home qualifies as a discharge, dispersal, migration, release, or escape."

The trial court noted that some jurisdictions refuse to apply the policy exclusion, holding that the terms "discharge, dispersal, release, escape, seepage or migration" are ambiguous and must be construed against the insurer. However, those courts that have found an ambiguity have done so by interpreting the provision from a "terms of art" point of view wherein they conclude that pollution exclusions apply only to environmental pollution because they arose out of environmental pollution claims. As that interpretation was rejected by the Georgia Supreme Court in *Reed*, the trial court in *Smith* held that the cases which find an ambiguity in the policy language have no application in Georgia.[10]

Smith, Brown and Chupp all appealed the trial court's order. Smith and Brown argued that it would be contrary to Georgia law and to the public policy of the State of Georgia to exclude injuries caused by lead-based paint from coverage because the terms "lead," "lead-based paint," or anything similar did not appear in the GFB policy and because lead-based paint does not fit into any of the substances listed in the policy's definition of pollutant. Smith and Brown additionally argued that the pollution exclusion was at best ambiguous and had to be construed in favor of coverage. In making this argument, Smith and Brown relied on the environmental pollution line of cases, rejected by the trial court, holding that the pollution exclusion is ambiguous.

Chupp made similar arguments on appeal, stating that the pollution exclusion was ambiguous and that because "lead" or "lead-based paint" or similar words were not contained in the GFB policy, no reasonable landlord would have understood the language of the policy to exclude coverage for injuries allegedly caused by the ingestion of lead-based paint occurring within a rental home. Rather, he argued, a reasonable person would conclude that the policy excluded environmental pollution instead. GFB, relying on *Reed*, argued on appeal that the pollution exclusion contained in the policy was an unambiguous, contractual term that must be enforced.

The Georgia Court of Appeals reversed the trial court's grant of summary judgment to GFB.[11] In ruling on what it recognized to be a matter of first impression in Georgia, the court sided with the jurisdictions holding that the pollution exclusion clause does not bar coverage for injuries allegedly arising out of the ingestion or inhalation of lead-based paint.[12] It cited specifically to *Sullins v. Allstate Insurance Co.*, a case out of Maryland, where that state's court of appeals held that the terms "contaminants" and "pollutants" in a pollution exclusion clause like GFB's were ambiguous and had to be construed against the insurer because the insured could have understood the pollution exclusion to exclude coverage for injury caused by certain forms of industrial pollution, but not coverage for injury caused by the presence of leaded materials in a private residence.[13] The Court of Appeals completely rejected *Reed* in reaching its conclusion, holding that the case was inapposite. The court found that while a straightforward reading of the pollution exclusion in *Reed* compelled the conclusion that the carbon monoxide gas claim fell within the exclusion, it was unclear whether the same language in the GFB policy was expansive enough to unambiguously include lead, lead-based paint, or paint as a pollutant.[14] The court held that lead-based paint was not clearly a pollutant as defined by the policy and if GFB had intended to exclude injuries caused by lead-based paint from coverage, it was required, as the drafter of the policy, to specifically exclude lead-based paint injuries from coverage.[15]

GFB filed a petition for certiorari to the Georgia Supreme Court, which was granted on the following issue: "Were the claims for personal injury resulting from lead-based paint ingestion excluded from coverage pursuant to the insurance policy's 'pollution exclusion'?" On appeal, GFB argued that the Court of Appeals erred in distinguishing *Reed* and erred in holding that if GFB intended to exclude injuries caused by lead-based paint from coverage, it was required to specifically exclude those injuries from coverage.

In its decision dated March 21, 2016, the Georgia Supreme Court sided with GFB and reversed the Court of Appeals, holding that lead-based paint was a pollutant as defined by the policy and that Smith and Brown's personal injury claims arising from lead poisoning due to lead-based paint ingestion were excluded from coverage pursuant to the pollution exclusion.[16]

Continued on next page

In construing the terms of the policy, the Court first looked to the text of the policy itself. Under the rules of construction for an insurance policy, words used in the policy are given their "usual and common" meaning, and the policy "should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney."[17] Where the contractual language is explicit and unambiguous, "the court's job is simply to apply the terms of the contract as written, regardless of whether doing so benefits the carrier or the insured."[18] However, if a policy provision is susceptible to more than one meaning, the provision is ambiguous and will be construed strictly against the insurer and in favor of the insured.[19]

The Court noted that the policy at issue contained an absolute pollution exclusion clause which precluded recovery for bodily injury or property damage resulting from exposure to any pollutant.[20] It reviewed the history of pollution exclusions contained in CGL policies and noted the split among jurisdictions over whether the exclusions applied to all injuries caused by pollutants or applied only to injuries or damages caused by what is traditionally considered environmental pollution.[21] Citing to three previous decisions from the Court of Appeals and the Supreme Court, the Court noted that Georgia courts have "[e]xpressly reject[ed] the notion that a pollution exclusion clause is limited to industrial and/or environmental harm," and have "repeatedly applied these clauses outside the context of traditional environmental pollution."[22] Further, Georgia courts, including the *Reed* court, have enforced absolute pollution exclusion clauses without requiring that the pollutant be explicitly named in the policy.[23] While the question of whether lead-based paint unambiguously qualifies as a pollutant under an absolute pollution exclusion was a question of first impression in the state, the method by which Georgia courts are to interpret absolute pollution exclusion clauses was clearly established in *Reed*. The Court held that *Reed* controlled the manner in which pollution exclusions in CGL policies are to be construed in this state, and therefore the Court of Appeals erred in failing to apply the *Reed* analysis to the facts of the case.[24]

The Court noted that the *Reed* court refused to adopt an approach which considered the purpose and historical evolution of pollution exclusions before looking to the plain language of the clause itself.[25] The plain language of the policy in *Reed*, wherein "pollutant" was defined to include "matter, in any state, acting as an 'irritant or contaminant,'" clearly encompassed carbon monoxide. Similarly, the plain language of the GFB policy, wherein "pollutant" was defined as including "solid, liquid, gaseous or thermal ir-

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ritant[s] or contaminant[s]," clearly encompassed lead-based paint.[26] Like the *Reed* Court, the *Smith* Court did not have to "consult a plethora of dictionaries and statutes to conclude that [lead-based paint was a pollutant]" to which the policy's pollution exclusion applied.[27] "Under the broad definition contained in Chupp's policy, [they] conclude[d] that lead present in paint unambiguously qualifies as a pollutant and that the plain language of the policy's pollution exclusion clause thus excludes Smith's claims against Chupp from coverage."

Georgia law is clear that insurance companies are generally free to set the terms of their policies as they see fit so long as they do not violate the law or judicially recognizable public policy.[28] Accordingly, a carrier may agree to insure against certain risks but decline to insure against others.[29] Through its decision in *Smith*, the Georgia Supreme Court reaffirmed the cardinal rule of contract construction that if the contract language unambiguously governs the factual scenario before the court, the court's job is to apply the terms of the contract as written, regardless of whether doing so benefits the insurer or the insured.[30]

The insured and the personal injury plaintiffs in *Smith* sought to have the courts find ambiguity where none existed by referencing extra-textual sources and asking that the courts consider the purpose and history of the pollution exclusion clauses. The Georgia Supreme Court unequivocally rejected that argument, and properly focused only on the plain language of the exclusion.

In addition, the *Smith* decision reiterated the principle that it is not necessary for an insurance policy to individually list each and every item excluded by a particular exclusion. As argued by GFB before the Georgia Supreme Court, to require, as the Court of Appeals did, an insurance policy to individually name all of the contaminants which are excluded by the pollution exclusion would be an impossible task, and under previous case law, such was not necessary in order for an exclusion to be enforceable.[31]

It is clear that any claim against a CGL policy possibly covered by a pollution exclusion should be analyzed under *Reed* and *Smith*. It is now established that the pollution exclusion contained in the policies at issue in *Reed* and *Smith* is unambiguous and applies to all injuries caused by pollutants as defined under the policy. The only question will be whether the exclusion language governs the particular factual scenario before the court. ❖

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ENDNOTES

1 298 Ga. 716, 784 S.E.2d 422 (2016).
2 *See Peace ex rel. Lerner v. Northwestern Nat. Ins. Co.,* 596 N.W.2d 429, 445 (Wis. 1999).
3 *Id.*
4 *Id.*
5 284 Ga. 286, 667 S.E.2d 90 (2008).
6 *Id.*
7 *Id.* at 288.
8 *Id.*
9 *Smith v. Ga. Farm Bureau Mut. Inc. Co.*, Civil Action No. 12CV1242 (Newton Co. Super. Ct. March 18, 2014).
10 *Id.*
11 *Smith v. Georgia Farm Bureau Mut. Ins. Co., 331 Ga. App. 780, 771 S.E.2d 452 (2015).*
12 *Id.* at 784.
13 340 Md. 503, 516, 667 A.2d 617 (1995).
14 *Smith*, 331 Ga. App. at 785.
15 *Id.* at 785.
16 *Georgia Farm Bureau Mut. Ins. Co. v. Smith,* 298 Ga. 716, 784 S.E.2d 422 (2016).
17 *Id.* at 424 (citing O.C.G.A. § 13-2-2(2) and *State Farm Mut. Auto. Ins. Co. v. Staton*, 286 Ga. 23, 25, 685 S.E.2d 263 (2009)).
18 *Id.* (quoting *Reed*, 284 Ga. at 287).
19 *Id.* at 424-25 (citing *Hurst v. Grange Mut. Cas. Co.,* 266 Ga. 712, 716, 470 S.E.2d 659 (1996)).
20 *Id.* at 425.
21 *Id.*
22 *Id.* (citing *Reed*, 284 Ga. at 288 (carbon monoxide), *American States Ins. Co. v. Zippro Const. Co*., 216 Ga. App. 499, 455 S.E.2d 133 (1995) (asbestos), *Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp.,* 190 Ga. App. 231, 378 S.E.2d 407 (1989) (smoke)).
23 *Id.* (citing *Reed*, 284 Ga. at 288 (carbon monoxide), *Truitt Oil & Gas Co. v. Ranger Ins. Co.,* 231 Ga. App. 89, 498 S.E.2d 572 (1998) (gasoline)).
24 *Id.*
25 *Id.* (citing *Reed*, 284 Ga. at 288).
26 In a footnote, the Court noted that the toxic effects of lead have been known for centuries and both the State of Georgia and the federal government have made findings about its hazardous nature and have enacted laws regarding maintenance and/or abatement of lead-based paint in residential housing units. *Id.* at 426.
27 *Id.* (citing *Reed*, 284 Ga. at 288).
28 *Reed*, 284 Ga. at 287 (citations omitted).
29 *Id.* (citations omitted).
30 *Id.* (citations omitted).
31 *See, e.g., Kroll Const. Co. v. Great Am. Ins. Co.,* 594 F. Supp. 304 (N.D. Ga. 1984) (holding that an insurer has no duty to include specific language where it has included general language to the same effect); *Auto-Owners Ins. Co. v. State Farm Fire & Cas. Co*., 297 Ga. App. 751 (2009) (holding that, in the context of a professional services exclusion, an insured was not required to list each and every professional service subject to the exclusion).

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injury was time-barred, as Barnes did not file a WC-14 Notice of Claim for the alleged 2009 injury until November 2012, more than three years later. The Court observed that the claimant's November 13, 2009 medical treatment would have extended the period for him to file his claim for a year from that date under O.C.G.A. §34-9-82(a). However, he did not file his claim within that period, and thus the claim became time-barred as of November 14, 2010 under the O.C.G.A. § 34-9-82 one-year statute of limitations.

The Court further held that the claimant's medical treatment in 2011 could not revive his already time-barred claim, citing *Poissonnier v. Better Business Bureau*, 180 Ga. App. 588 (1986). Finally, the Supreme Court expressly rejected the framework that the Court of Appeals' holding would have established, where an injured worker could revive any stale claim at any time by seeking further medical treatment, as such a result "would essentially render the one-year statute of limitation of O.C.G.A. § 34-9-82(a) meaningless." *Barnes*, 2016 WL 3147567 at *3.

An interesting final point, buried in the last footnote, is the Supreme Court's refusal of Roseburg's argument that the employer and the insurer are not alter egos: "Regardless of which entity connected with Roseburg made the payments, Roseburg as a whole is the entity responsible for ensuring that the payments are made. Both [the servicing agent] and ACE American are alter egos of Roseburg for purposes of the workers' compensation claims for which Roseburg, as a whole, is ultimately responsible." *Barnes*, 2016 WL 3147567 at *4, fn 5.

All the same, this is certainly a favorable decision for the defense bar, and one in which GDLA may have contributed to through its filing of an amicus brief. That amicus brief can be found in the Members' Only area of our website under Amicus Policy & Previous Briefs. ❖

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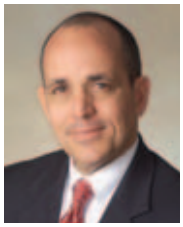
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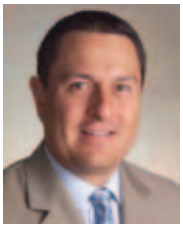
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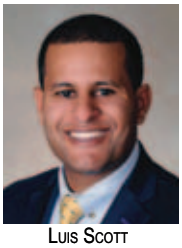
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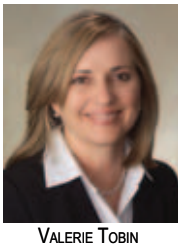
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of Clean Water Act jurisdiction as governed by the Act's defining phrase "Waters of the United States," referred to commonly as "WOTUS." To remedy the effects of the *Rapanos* decision of the agencies' enforcement power, the new rule was promulgated to revise the definition of WOTUS by adding classes and categories of waters and creating other definitive rules for identifying WOTUS.

Immediately after publication of the final Clean Water Rule, numerous states, industry and environmental groups filed legal challenges in courts across the country. On July 28, 2015, the U.S. Judicial Panel on Multidistrict Litigation consolidated all Court of Appeals cases in the Sixth Circuit. Shortly thereafter, a coalition of 18 states (Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia and Wisconsin) filed motions with the Court seeking (1) a stay of the rule during the pendency of the court's proceedings and (2) a ruling from the Sixth Circuit that it lacked jurisdiction to hear their appeals (enabling pursuit of their cases before the district courts).

The Sixth Circuit found that the petitioners had demonstrated a "substantial possibility of success on the merits of their claims," specifically mentioning that it was not clear that the new rule's distance limitations were consistent with the Supreme Court's 2006 decision in *Rapanos*. The court also found that the government had not "persuasively rebutted" the petitioners' argument that the rule's bright-line distance limitations were devoid of specific scientific support.

Until further notice, the Clean Water Rule is no longer in effect anywhere. Despite various motions for rehearing, the stay remains effective.

Immediately after publication of the final Clean Water Rule, numerous states, industry and environmental groups filed legal challenges in courts across the country.

U.S. Supreme Court Stays Far-Reaching EPA Green House Gas Rules

Order in Pending Case 15A787, *Chamber of Commerce, et al. v. EPA, et al.* (U.S. Feb. 9, 2016).

Last fall, EPA promulgated a sweeping rule to curtail the emission of so-called "greenhouse gases" (GHG) that will affect power generation facilities nationwide for the foreseeable future. In February, the Supreme Court, in response to widespread challenges, stayed the rule. This rule, entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is actually a series of rules which, although they were only effective for a few months, had already begun to dramatically affect the way power companies generate electricity and their planning for future generation capacity.

The following summary of the rules illustrates their far-reaching impact, which may have helped the Supreme Court justify its decision to require a closer look at this significant EPA mandate.

The Rules. The GHG rules are a series of three proposed rules which compose President Obama's "Climate Action Plan." The first rule in this trio (actually a reissued rule from the year before) was proposed on January 8, 2014, and would impose standards of performance for greenhouse gas emissions from new electric generating units (EGU). EPA followed this new source rule proposal with two proposed rules on June 18 for existing and modified/reconstructed EGUs, and an October "supplemental proposal" to address carbon pollution from power plants in Indian country and U.S. territories.

In the first rule, promulgated under Clean Air Action section 111(b), which authorizes EPA to set standards of performance for new, modified and reconstructed sources, EPA proposed, as described by the Agency, "new standards of performance for new affected fossil fuel-fired electric utility steam generating units and stationary combustion turbines, ... a separate standard of performance for fossil fuel-fired electric utility steam generating units and integrated gasification combined cycle units that burn coal, petroleum coke and other fossil fuels, ... and standards for natural gas-fired stationary combustion turbines." 79 Fed. Reg. 1,430 (Jan. 8, 2014). The proposed standards for coal and petroleum fired generating units would be "based on partial implementation of carbon capture and storage as the best system of emission reduction." For natural gas-fired units, the best system of emissions reduction would be "based on modern, efficient natural gas combined cycle technology as the best system of emission reduction." Notice was published in the Federal Register on January 8, 2014. Public comments were accepted until May 9, 2014, and EPA received approximately 2 million comments.

On June 2, 2014, EPA proposed standards to limit carbon pollution from modified and reconstructed

power plants under Clean Air Act section 111(b). Notice was published in the Federal Register on June 18, 2014, and comments were accepted until December 1, 2014. The proposed limits are based on available technology and depend on the type of unit (fossil fuel-fired or natural gas-fired). Unlike parts of the proposal for new plants, the standards for modified and reconstructed plants are not based on carbon dioxide capture and sequestration (CCS).

Also on June 2, 2014, EPA proposed its rule for existing power plants based on Clean Air Act section 111(d). Section 111(d) provides for a rarely used program under which EPA develops a procedure for states to establish standards of performance for existing sources. Here, those standards—based on EPA's determination of what constitutes the best system of emission reduction or "BSER"—are to be designed to achieve substantial reductions in carbon emissions. Under the proposed rule, BSER would be based on a combination of emission rate improvements and emission limits that can be achieved through a mix of four types of measures that EPA refers to as "building blocks": 1) improving heat rate efficiency at coal-fired plants; 2) increasing use of natural gas-fired sources; 3) increasing use of zero- and low-emitting sources; and 4) increasing demand-side efforts to use electricity more efficiently. Notice was published in the Federal Register on June 18, 2014, and comments were accepted until October 16, 2014. EPA received more than 2 million comments.

Though all of the rules impose substantial and controversial requirements, the June rule for existing power plants appears to be the most far-reaching and therefore has drawn the most attention. This rule, dubbed the Clean Power Plan by the administration, is projected by EPA to reduce emissions from electric generating units by 30% below a 2005 baseline by 2030. The proposed rule would require states to submit plans to reduce carbon dioxide emissions by establishing for each state a target rate of emissions, i.e., the amount of carbon dioxide that a state may permit to be emitted from its EGUs per megawatt-hour of power produced. The required reductions range from 11% in North Dakota to 72% in Washington. Critics note that unlike previous EPA rules that have confined requirements to "within the fence" of regulated entities, this rule goes way "beyond the fence." In other words, an EGU in a state cannot come into compliance by taking measures that affect the particular plant; instead, compliance will require the state to show increased efficiencies at other plants, a shift from coal-fired to natural gas-fired plants, an increased use of zero- and low- emitting sources and other measures that do not apply to a particular plant.

Legal Critique. Critics assert that CAA section 111(d) prevents the Agency from regulating pollutants from sources regulated under section 112 and, by regulating energy use outside of the fence, EPA is attempting to regulate the use of energy and not the environment. Because the CAA gives EPA no authority over federal or state energy regulation, EPA is seen as exceeding its mandate to regulate environmental issues.

Costs and Benefits. The intended benefits sought from the rules are to a large degree focused on reducing the emissions of GHGs. According to EPA, the Clean Power Plan will lead to climate and health benefits worth an estimated $55 billion to $93 billion in 2030, including avoiding 2,700 to 6,600 premature deaths and 140,000 to 150,000 asthma attacks in children. Critics believe EPA's health claims unfairly double count benefits from other CAA programs such as the National Ambient Air Quality Standards (NAAQS) and that the cost savings are based on an imprecise and ambiguous "social cost of carbon value." Costs of the measures are estimated by regulated entities to range from $1 billion per year to $1.1 trillion over 10 years, and contain other, unquantified potential costs, including impacts on the reliability of power transmission that could have catastrophic effects nationwide.

There is little question that the President's Climate Action Plan proposes innovative, far-reaching and controversial measures, and it is not clear that the quantifiable benefits of the regulations would justify the unprecedented costs. What is abundantly clear is that the rules have garnered substantial attention and that the conversation about how to regulate carbon emissions from power plants is far from over. ❖

Continued from page 18

time to consider the impact of an adverse decision versus a negotiated resolution is useful. Will a loss at trial have far-reaching implications for the future of the business? Could it impact future claims against the company? What could a loss at trial cost the company in terms of future policy-making, employee productivity, morale, or profitability? What is the worst-case scenario at trial and how much is that worth to avoid? Using information gleaned during the mediation process can help you and your client navigate these issues. Weighing risk factors, the likelihood of achieving your best-case scenario and at what cost can be insightful for settlement value and strategic decisions in the case.

The benefits of ADR expand beyond pure settlement. Mediation is an inexpensive way to see the other side on a different level, to view the evidence in a new light and to better understand your adversary's approach so you can focus your strategy accordingly. It might reveal new information that changes the way your client views the case or uncover new theories or defenses. Using an intermediary to talk through the evidence and potential risk factors can give you a fresh perspective on the case and give companies an opportunity to take a serious look at the short and long term impact of the case on the company's bottom line. Since litigation can take a toll on a company far beyond the immediate effects of litigation costs and a judgment, giving serious thought to the business implications may affect decisions on conflict resolution. Mediation is also a better approach if the parties plan to have any ongoing or long term future business relationship, as nothing fractures a relationship like a trial. While juries can be unpredictable, and some trials are unavoidable, the use of mediation can play a valuable role in better preparing you and your client for that uncertainty. The more information you know, the better prepared you will be. ❖

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