

*Reasonableness  
and Necessity of  
Medical Bills*

*Standard of Proof in  
Data Breach Cases*

*Can You Trust Your Fire  
Investigator's Report*

*A Proper Case for  
Opening Default*

*2020 Legislative  
Session Review*

*Mask Up For Justice!*

# GEORGIA DEFENSE LAWYER

*A Magazine for the Civil Defense Trial Bar*

Volume XVI, Issue II

Fall 2020

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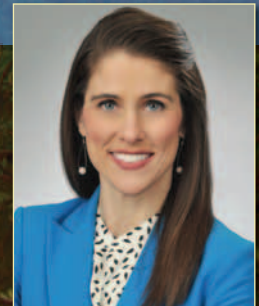
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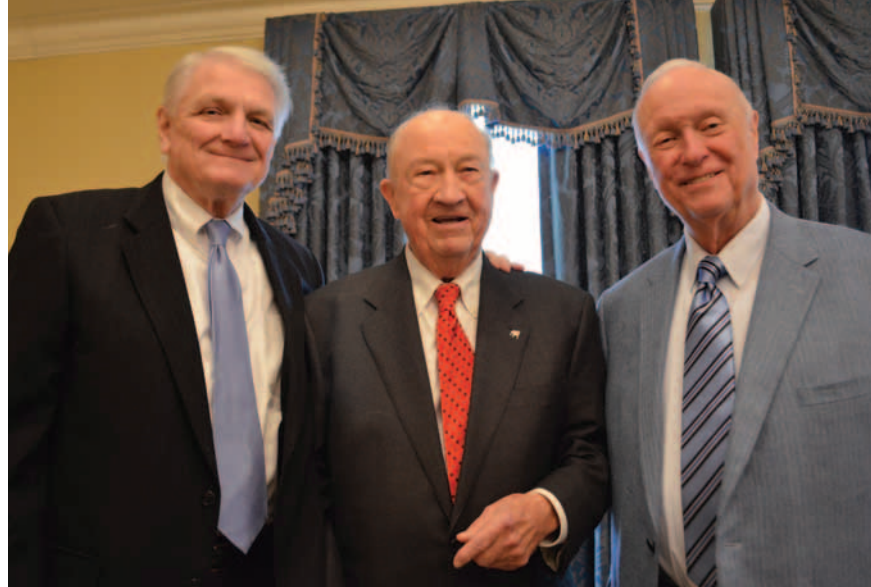
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**GEORGIA DEFENSE LAWYER**

Volume XVI, Issue II

**EDITOR-IN-CHIEF:**

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*Georgia Defense Lawyer*, the official publication of the Georgia Defense Lawyers Association, is published three times annually. For editorial information, please contact the

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# Incoming President's Message

In these uncertain times of pandemic and civil unrest, to quote Bob Dylan and GDLA Past President Jerry Buchanan, "the times, they are a changin'." Viewed against the backdrop of calendar year 2020 so far, I am happy to report that GDLA membership and its efforts to advance the civil defense bar are robust. I am humbled to follow in the footsteps of the previous 52 wonderful leaders of this organization.

As attorneys, it is incumbent upon us to teach our younger and less experienced colleagues. Be a mentor. My mentor (now Judge) Wallace E. Harrell, Jr., the most professionally courteous, polite, brilliant trial lawyer I know, introduced me to GDLA through what is now called Trial & Mediation Academy held at Callaway Gardens. I challenge the GDLA membership to send a young lawyer to this exceptional training program. The in-

struction and mentoring from the experienced trial lawyers who serve as the faculty is unparalleled. Each of the instructors will bear witness to the fact that even they learn something new every year and lifelong friendships are made. While we all observe that the occurrence of the civil jury trial seemingly decreases on an annual basis, as advocates for our clients, we owe it to the profession to practice and hone our craft. Trial & Mediation Academy provides this opportunity for lawyers of all experiences and ages.

As in recent years, the GDLA amicus program remains extremely active with almost weekly requests for the organization to weigh in on legal topics important to our membership. In the past year, we have



Jeff Ward

*Continued on page 56*

# Outgoing President's Message

It has been a pleasure, honor and privilege to serve as the 52<sup>nd</sup> President of the Georgia Defense Lawyers Association. It seems fitting that with the ongoing issues created by the COVID-19 pandemic that my year ended with a Zoom meeting and at that same virtual meeting a new slate of officers was installed, including Jeff Ward as the 53<sup>rd</sup> President of GDLA. I could not have imagined that at the start of my term.

GDLA enjoyed great success during 2019-2020. Jake Daly of Freeman Mathis & Gary was asked to present testimony to the Senate Study Committee on Reducing the Cost of Doing Business in advance of this year's legislative session. The GDLA Amicus Committee continued its excellent work under the leadership of Chair Elissa Haynes of

Drew Eckl & Farnham, and she appeared on its behalf for oral arguments before the Georgia Supreme Court after the GDLA was asked to file an amicus brief in *Reid v. Morris*.

Adversity is said to be a true test of character, and I could not be prouder of the character of GDLA's Past Presidents, Board members and our Executive Director, Jennifer Davis Ward, who have all worked tirelessly over past several months to continue to advance the interests of the defense bar during these unsettled times. I have to thank Pamela Lee of Swift Currie who edited this year's GDLA *Law Journal* during the pandemic as well as the



Dave Nelson

*Continued on page 56*

# Member News & Case Wins

## MEMBER NEWS

GDLA Past President **Sarah B. “Sally” Akins** of **Ellis Painter** in Savannah was sworn-in as Treasurer of the State Bar of Georgia. GDLA congratulates **Darrell Sutton** of **Sutton Law Group** in Marietta, who completed his year as State Bar President in June. **Norbert D. “Bert” Hummel IV** of **Lewis Brisbois** in Atlanta and **Elissa B. Haynes** of **Drew Eckl & Farnham** in Atlanta were installed as President and President-Elect, respectively, of the Bar’s Young Lawyers Division.

GDLA Past President **N. Staten Bitting, Jr.**, was appointed to the Supreme Court of Georgia’s Commission on Dispute Resolution (GCDR). The 20-member group was established to administer a statewide comprehensive alternative dispute resolution (ADR) program; oversee the development and ensure the quality of all court programs; develop guidelines and approve court programs; develop criteria for training and qualifications of neutrals; and establish standards of conduct for neutrals. Mr. Bitting has been a partner at **Fulcher Hagler** in Augusta since 1992 and has been a registered neutral for over seven years.

**David Hanson**, a partner at **Weathington** in Atlanta, testified in front of the Georgia General Assembly advocating for greater liability protection for healthcare providers due to the COVID-19 pandemic. Three days later, on June 26, 2020, legislators passed the “Georgia COVID-19 Pandemic Business Safety Act.” The bill provides a heightened standard of gross negligence for three types of claims: (1) claims for transmission of COVID-19; (2) claims for medical malpractice related to COVID-19; and (3) claims against

manufacturers of personal protective equipment (PPE). Mr. Hanson authored an article on the subject in the July 3, 2020 edition of the *Daily Report*.

**Jennifer Dorminey Herzog**, a partner in **Hall Booth Smith’s** Tifton office, was sworn in to serve on the 2020-2021 Association County Commissioners of Georgia (ACCG) Board of Managers as President of the County Attorneys Section. A native of Tifton, she focuses her practice in the area of governmental liability and serves as County Attorney for Berrien County and Assistant County Attorney for Coffee County, Tift County and Ware County.

**Hall Booth Smith** announced the election of **Alexandra “Alex” Battey** to partner in its Atlanta office. She focuses her practice on professional and medical malpractice defense.

**Michael D. St. Amand** of **Gray Rust St. Amand Moffett & Brieske** in Atlanta received the State Bar of Georgia General Practice & Trial Section’s Tradition of Excellence Award for the defense. The award was presented virtually after the 2020 State Bar Annual Meeting set for June in Sandestin was cancelled due to the COVID-19 pandemic.

**Hunter Maclean** in Savannah announced the election of **Patrick L. Barkley** to partner. His practice focuses on specialty litigation, including admiralty, transportation, logistics, commercial collections, insurance defense, business litigation and real estate litigation.

**Nelson Mullins Riley & Scarborough** in Atlanta announced that associate **Amy Cheng** was named a member of the 2020 class of Pathfinders. Designed by the Leadership Council on Legal Diversity (LCLD), the program trains diverse, high-performing, early-career

attorneys in critical career development strategies, including leadership and the building of professional networks.

**Freeman Mathis & Gary** in Atlanta announced that **Matthew Boyer**, formerly a partner at **Nall & Miller**, has joined the firm as a partner. He will concentrate on insurance coverage and government liability litigation. Mr. Boyer is a Captain in the JAG Corps of the United States Air Force as a reservist and has served as a Special Assistant Attorney General (SAAG) for the State of Georgia.

**Michael DiOrio**, formerly with **Carlock Copeland & Stair**, has joined **Lewis Brisbois Bisgaard & Smith** as a partner in the firm’s Atlanta office. He will continue to maintain a general civil defense practice focusing in the areas of medical negligence, premises liability and product liability.

**James-Bates-Brannan-Groover**, with offices in Macon and Atlanta, announced the addition of **Bruce Dubberly** and **D. Sarah Young** to the firm’s General Litigation Practice Group. Mr. Dubberly focuses on general civil litigation, including business litigation, tort litigation, as well as eminent domain, bankruptcy and probate law. Prior to joining the firm, Ms. Young worked as an Assistant District Attorney in the Monroe County District Attorney’s Office.

**Swift Currie McGhee & Hiers** in Atlanta announced **Gillian Crowl** has been named a member of The National Black Lawyers’ Top 100. This invitation-only membership is limited to the top 100 African-American attorneys in Georgia who promote diversity and equality in the legal system. Ms. Crowl’s addition follows last year’s inductions of Swift Currie attorneys **Marvis Jenkins** into the organization’s Top



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100 and **Sara Alexandre** into the organization's Top 40 under 40. The *Daily Report's* 2020 Georgia Legal Awards honored several

GDLA members and firms during a virtual ceremony on June 24, 2020. **King & Spalding** was named Law Firm of the Year. Litigation Department of the Year awards went to **Weinberg Wheeler Hudgins Gunn & Dial** (midsize firm) and **Swift Currie McGhee & Hiers** (midsize firm). **Drew Eckl & Farnham**, **Eversheds Sutherland** and **Troutman Sanders** were named Most Innovative Law Firms. On the Rise honorees were **Dee DeBardeleben** of **Weinberg Wheeler Hudgins Gunn & Dial** in Atlanta, **William P. Horkan** of **James-Bates-Brannan-Grover** in Macon, **Crystal McElrath** of **Swift Currie McGhee & Hiers** in Atlanta and **Mariel E. Smith** of **Hall Booth Smith** in Columbus.

**Candis Jones Smith**, a partner at **Lewis Brisbois** in Atlanta, was installed as President-Elect of the Gate City Bar Association. Established in 1948, it is the oldest African-American bar association in Georgia. She is also a member of the GDLA Board of Directors.

**Jeff Hickcox**, **Clay Robertson** and **John Stunda** announce their departure from **McLain & Merritt** in Atlanta to form **Hickcox Robertson & Stunda**. **McLain & Merritt** wishes them the best in their new practice where they will continue to represent employers and insurers in workers' compensation claims. They are grateful for their many years at their prior firm.

GDLA Executive Director **Jennifer Davis Ward** was reappointed by the Supreme Court of Georgia to a three-year term as a nonlawyer on the State Disciplinary Board. That body is empowered to investigate and discipline lawyers for violations of the Georgia Rules of Professional Conduct. She was also

tapped by Supreme Court Chief Justice Harold Melton to serve on the Chief Justice's Commission on Professionalism's Grants Subcommittee, which is chaired by Fulton State Court Judge Susan B. Edlein.

## CASE WINS

**Hank Fellows** of **Fellows LaBriola** in Atlanta and his co-counsel successfully defeated a purported federal trademark action brought by **Tarsus Connect, LLC**, against **Cvent, Inc.**, a registration software service provider. **Tarsus Connect** challenged **Cvent's** use of its registered trademark, "Cvent Connect." By Order entered on April 2, 2020, U.S. District Judge Steven D. Grimmerberg granted **Cvent's** Motion for Summary Judgment as to all of **Tarsus Connect's** claims and denied **Tarsus Connect's** Motion for Partial Summary Judgment. The Court rejected **Tarsus Connect's** claims that there was a likelihood of confusion between "Connect Marketplace" and "Cvent Connect," and it also rejected **Tarsus Connect's** claim that it had protectable trademark rights in the word "Connect." The Order entered final judgment in favor of **Cvent, Inc.** on April 2, 2020. The case is *Tarsus Connect, LLC v. Cvent, Inc.*, Civil Action File No. 1:17-cv-05165-SDG.

GDLA President-Elect **George Hall** and **Jordan Bell** of **Hull Barrett** in Augusta successfully defended a local car dealership and a national bank sued for revocation of acceptance, breach of warranty, violation of Georgia Fair Business Practice Act and punitive damages. The case was tried in the Superior Court of Columbia County. The plaintiffs had purchased an expensive vehicle from the local dealership; the car was financed by the bank. The plaintiffs alleged that the vehicle had been wrecked prior to being sold to them and was defective. They sought damages in excess of \$100,000. The case was tried during the week of February 17, 2020. At

the conclusion of the plaintiffs' case, the presiding judge granted a Motion for Directed Verdict on all claims for both defendants.

GDLA Vice President **Martin A. "Marty" Levinson**, **Matthew F. "Matt" Barr** and **Elliott C. Ream** of **Hawkins Parnell & Young** in Atlanta obtained a very favorable ruling from the Court of Appeals on March 13, 2020 when the Court reversed a trial court's denial of Summary Judgment for their client, **St. Jude's Recovery Center**, a residential drug treatment and rehabilitation center in Atlanta.

The lawsuit was filed in the State Court of Fulton County by a former resident of **St. Jude's** drug treatment program. The plaintiff was attacked and raped by an unknown criminal when she was about a mile from the **St. Jude's** property she had previously departed on her way to work. The plaintiff presented claims under premises liability theories and argued that **St. Jude's** assumed a duty, under the Restatement (Second) of Torts § 324A, to protect the plaintiff while she walked to the bus stop to get to work. After denying **St. Jude's** Motion for Summary Judgment, Judge Jay Roth granted the defendant's request for a certificate of immediate review, and the Georgia Court of Appeals agreed to hear the appeal on an interlocutory basis.

In its opinion, the Court of Appeals found that **St. Jude's** was entitled to summary judgment due to a lack of proximate cause. The Court did not address duty or breach elements. Instead, the Court of Appeals held that the evidence was insufficient to show that any alleged breach of duty by the defendant was the proximate cause of the rape. Specifically, the Court held that evidence of prior instances where some residents reported a man followed them on their way back from the bus stop or that some construction workers yelled at or harassed residents or even **St. Jude's** knowledge that its residents were part of a "vulnerable" popula-

tion was insufficient to make the attack foreseeable. Chief Judge Christopher McFadden, who wrote the opinion, relied heavily on *Goldstein, Garber & Salama, LLC v. J. B.*, 300 Ga. 840 (2017) and *Medical Center v. Cavender*, 331 Ga. App. 469 (2015), both of which found that the criminal act of a third-party perpetrator was not proximately caused by the alleged negligence of the defendant. This case, along with several other recent decisions, further reinforces the importance of foreseeability and proximate cause in cases involving a third party's criminal act. As Chief Judge McFadden explained, "[W]ithout reasonable foreseeability—a hallmark of proximate cause—there exists no genuine issue of material fact as to the third element of [the plaintiff's] negligence claim: causation." Slip Op. p. 9, citing *Tyner v. Matta-Troncoso*, 305 Ga. 480, 488 (2019).

**Sandra Foster** of Savannah's **Brennan Wasden & Painter** and former member, now Chatham Magistrate Court administrator/deputy clerk, **Tracie Macke**, wrote a very persuasive amicus brief on behalf of GDLA in the Court of Appeals. The case is *St. Jude's Recovery Ctr., Inc. v. Vaughn*, No. A19A2438, 2020 Ga. App. LEXIS 193 (Mar. 13, 2020).

**Karen Karabinos** and **Mary Alice Jasperse** of **Drew Eckl & Farnham** in Atlanta obtained an order from the Eleventh Circuit Court of Appeals affirming the district court's grant of summary judgment for their client LM Insurance Corpo-

ration in the case of *Mia Hollingsworth v. LM Insurance Corporation*. At issue in that case was whether the insurer breached the insurance policy by not paying the policy limit for the dwelling as a result of the fire damage to the insured's home. The insured claimed that her home was "wholly destroyed" by fire and, therefore, under Georgia's Valued Policy Statute, O.C.G.A. 33-32-5(a), she was entitled to the policy limit. Both the Eleventh Circuit and the district court found that the insured's evidence did not support her contention that her home was wholly destroyed. While the Eleventh Circuit focused on the insured's deposition testimony and photographs taken two weeks after the fire submitted on the "wholly destroyed" issue, Judge Tripp Self with the Middle District of Georgia also addressed other evidence submitted by the insured, including the inadmissibility of estimates from Zillow.com and Realtor.com that the insured attempted to use to support her argument that she could replace her home with an existing similar home for less than the cost to repair the fire damage to her home. These two federal court opinions together will provide much needed guidance to insurers regarding what evidence will, and will not, support a finding that a structure is "wholly destroyed" by fire.

In another case, Ms. Karabinos and Ms. Jasperse teamed up with Drew Eckl partner **Douglas Burrell** to obtain a defense verdict

in an arson case. Their client, Travelers Home & Marine Insurance Company, denied the homeowners' fire claim on the grounds that the fire was either intentionally set by one of Plaintiffs or they procured someone to set the fire for them. In addition, Travelers denied their claim on the grounds that they concealed and misrepresented material facts regarding their fire claim. In a two-week trial in the United States District Court for the Northern District of Georgia, Atlanta Division, Plaintiffs' counsel asked for nearly \$600,000 in damages to the dwelling and contents plus additional living expenses. Defense counsel successfully obtained an Order granting their client's Motion for Judgment as a matter of law on Plaintiffs' bad faith claim following the closing of Plaintiffs' case-in-chief. The jury returned a defense verdict on March 6, 2020 and awarded Travelers \$64,641.11 representing the advancements and additional living expenses paid to Plaintiffs prior to the denial of their claim.

**Troy Lance Greene** of **Troy Lance Greene P.C.** in Vidalia recently notched a couple of big victories. The first case was a workers' compensation matter involving the death of a claimant, where he prevailed before an Administrative Law Judge by proving the claimant was an independent contractor and not an employee of Mr. Greene's client. Significantly, the State Board of Workers' Compensation (on a cross-appeal) ruled the claim was also barred under O.C.G.A. § 34-9-



## SHARE YOUR NEWS AND CASE WINS!

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17, commonly called the marijuana statute. A toxicologist testified the decedent had marijuana in his system that would have impaired him at the time he died. The most striking part of the Board's decision was the decedent's blood was not drawn until two days after his death. It had been commonly assumed by the workers' compensation bar (and most of the judiciary) if the blood was not drawn within eight hours of the injury or death, the rebuttable presumption contained in the marijuana statute would not apply. That is, if there is marijuana in a claimant's system within eight hours of his death there is a rebuttable presumption the marijuana caused the accident. This decision of the Board was extremely important for the defense bar. In this case the toxicologist testified even though the blood was drawn two days later, the claimant would have had marijuana in his system within eight hours of his death. This decision seems to do away with the commonly held assumption that blood must be drawn within eight hours of the injury or death in order to obtain the rebuttable presumption.

In a second case in Montgomery County, Mr. Greene prevailed in a matter involving an application of the "Fireman's Rule." This rule stands for the proposition a fireman (or any other public safety officer) cannot recover from a defendant if they are injured while performing their duties. An exception would be if the defendant deliberately caused harm to the fireman. In Mr. Greene's case, the plaintiff was a voluntary fireman. The fire department had an agreement with the county that if a fireman was injured on the job, they would pay disability benefits to the fireman. The plaintiff had traveled along with other firemen to the defendant's residence for the purpose of burning a pile of trash.

The defense contended the fireman were also using this as a training exercise. They were using fire department equipment and were in

fire department vehicles. The plaintiff was severely burned (medicals in excess of \$200,000) when there was an explosion as he tried to light the fire. He alleged the defendant told him that earlier in the day her son had tried to burn the pile of trash but had been unsuccessful. The plaintiff's theory was this heightened the risk of harm to him. However, the defense established, through expert testimony, by the time the fire was lit any accelerant had long dissipated. Also, through expert testimony, the defendant established the plaintiff engaged in unsafe outdoor burning practices at the time of the fire.

Finally, an official from the department that licenses firemen and volunteer firemen for the State of Georgia testified the plaintiff was not an accredited fireman at the time of the incident as he had not passed his test. Accordingly, he was not even supposed to be engaged in training activities.

Obviously, the plaintiff disputed the fact he was acting as a fireman and contended this was just a benevolent act the fire department undertook to help a citizen of the community. The original trial judge denied summary judgment and held there was a factual question as to whether he was acting as a fireman. The trial would have been bifurcated on that issue with the jury having to first establish whether he was a fireman (or not) before proceeding to the issues of negligence, damages, etc. During a motion in limine hearing immediately before the trial commenced, the judge indicated he would allow in the fact the plaintiff had received disability benefits as result of the fire to show he was acting as a fireman.

Normally, this would have been a violation of the collateral source rule but the defense was able to point out that in certain situations collateral source evidence can be admitted for proving other issues and not to simply reduce the plaintiff's damages. When the judge made this ruling and with the jury

on standby, the plaintiff dismissed the case.

GDLA Secretary **Pamela Lee** of **Swift Currie McGhee & Hiers** in Atlanta and achieved a defense verdict in a premises liability case in the State Court of Stephens County in February 2020. The case involved a trip and fall on a raised crack in a sidewalk outside a department store. Summary judgment was denied because, although the crack was open and obvious, Plaintiff alleged that it was dark when the incident occurred and there was insufficient lighting in the area. Plaintiff claimed over \$150,000 in medical expenses for a shoulder surgery and a cervical fusion. Plaintiff further claimed over \$600,000 in lost wages alleging she could never return to work. On the third day of trial, following approximately an hour of deliberations, the jury returned a defense verdict.

**Wayne S. Melnick**, a partner in the Atlanta office of **Freeman Mathis & Gary** and former GDLA Board member, obtained an affirmance from the Georgia Court of Appeals of a grant of summary judgment in *Shields v. RDM, LLC*, a trip and fall case where the plaintiff fell off stacked gym mats at defendant's gymnasium while attending her daughter's special needs cheer team's exhibition, breaking her leg in four places. In affirming the grant of summary judgment, the appellate court determined that the medical release and waiver form executed by plaintiff that was not restricted to any "program, event or time period" was valid and enforceable to bar plaintiff's claims (and her husband's derivative loss of consortium). The Court of Appeals also affirmed the trial court's finding that the Georgia Recreational Properties Act provided immunity to the defendant for plaintiff's claims. Using the recently clarified analysis for same, the Court determined that "the true scope and nature of the landowner's invitation to use its property" was the exact kind that the RPA was created to

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protect and that “[t]o put it plainly, this case is the poster child for immunity under the RPA.” Only RDM’s counter-claim for attorney’s fees and litigation expenses based on plaintiff’s breach of the medical release and waiver form was left pending before the trial court. At press time, the defense was still determining what to do regarding that claim.

In another case, Mr. Melnick obtained summary judgment in a wrongful death case brought against a public high school coach based on the death of her child while at school. In this matter, the decedent, a high school student, suffered a cardiac event from a previously unknown issue while at “free play” in the school gym and under the supervision of the defendant coach/teacher. Plaintiff argued the coach violated a ministerial duty by not having his required CPR certification as required by district policy of all coaches involved with interschool athletics. In granting summary judgment, the trial court agreed with the defense that the coach was entitled to official immunity because the “ministerial” duty identified was not applicable to the coach who was acting in a non-coaching capacity at the time he was supervising the students at “free play” in the gym, and that even if the duty was applicable, it was not so “simple, absolute and definite” to make it a ministerial duty as opposed to a discretionary one for which he was entitled to immunity. The Court had also bifurcated discovery to focus the initial discovery on the immunity issues. Even though the causation element was not before the Court on summary judgment, it noted that the policy at issue did not mandate the coach to use the lifesaving techniques taught during the required, but missing, training in a specific manner.

**Kimberly D. Stevens** led a team of **Hawkins Parnell & Young** lawyers in obtaining a series of first impression orders compelling arbitration in actions filed against Uber and its

subsidiaries. These orders were the first in Georgia to address online and in-app manifestation of assent to contractual terms as well as admissibility of evidence obtained through the Internet Archive’s Wayback Machine. These decisions are significant wins that have created promising Georgia precedent for companies as they move forward in the digital age. The cases follow:

On March 2, 2020, **Ms. Stevens, Willie C. Ellis, Jr., LeRyan Lambert and Jeff Adams** secured an order compelling arbitration from Judge Kimberly Anderson in DeKalb County State Court in *Estate of Marcene Thornton v. Uber Technologies, Inc. et al.* CAFN: 19A76990. Uber argued that Mr. Thornton, assented to the Uber Terms, including its arbitration provision, when: (1) he created his Uber App account via his smartphone and was notified that by doing so, he agreed to its terms and conditions that were provided via a hyperlink; (2) he was subsequently sent an email notifying him that ongoing use of the Uber App would manifest agreement to the updated terms and conditions, including updates to the arbitration terms; and (3) he used the Uber App for which any reasonable consumer knows terms apply. Plaintiff primarily argued that the hyperlink in the registration process was insufficiently conspicuous to render assent and that Uber could not prove that Mr. Thornton actually received the subsequent email advising of updated terms. In line with courts across the nation and Georgia contract law, the Court found that he assented to Uber’s Terms and created a binding and enforceable arbitration agreement. At oral argument, Plaintiff conceded that the parties delegated arbitrability questions solely to the arbitrator and that Mr. Thornton’s estate was bound by his assent. The Court stayed the action pending the arbitrator’s decision on arbitrability.

On April 2, 2020, **Ms. Stevens, Ms. Lambert and Mr. Adams** secured an order compelling arbitration from Judge Susan Edlein in Fulton County State Court in *Christin Friedman v. Uber Technologies (GA), Inc. et al.*, CAFN: 18EV004804. Based on a similar smartphone registration process, email notification regarding updated terms, use of the Uber App and rejecting similar opposing arguments as were rejected in *Thornton*, the Court found that Plaintiff agreed to Uber’s Terms and Conditions, including its arbitration provisions, and that any questions of arbitrability were delegated solely to the arbitrator. The Court dismissed the action against the Uber defendants without prejudice.

On June 2, 2020, **Ms. Lambert and Ms. Stevens** secured an order compelling arbitration from Judge Ronda Colvin Leary in Gwinnett County State Court in *Jennifer Long v. Uber Technologies (GA), Inc. et al.*, CAFN: 19C-6609-4. This case was slightly different because Plaintiff registered her Uber Account via the internet as opposed to in-app. Nonetheless, Plaintiff also contested assent arguing: (1) the website’s language advising Plaintiff that by creating an account, she was agreeing to the terms of use was insufficiently conspicuous for inquiry notice; (2) a unilaterally sent email updating terms was unenforceable; and (3) Uber’s evidence, partly using the Wayback Machine, was incompetent for Uber to meet its burden. Plaintiff conceded at oral argument that the arbitrator had the sole authority to evaluate issues of arbitrability. The Court found that Plaintiff assented to the Uber Terms, including their arbitration provisions and the Wayback Machine evidence could be authenticated and was therefore admissible. The Court stayed the action pending the arbitrator’s decision on arbitrability.

**E. Tyron Brown** of **Hawkins Parnell & Young’s** Atlanta office se-

cured summary judgment in the trial court and argued and prevailed on appeal in the Georgia Court of Appeals for his client, a property management company, in a premises liability case involving the murder of a tenant. The defendants owned and operated the apartment complex in Macon where the plaintiffs' son, Milton Stephens, Jr., was fatally shot after opening his apartment door to a person at 3 a.m. on August 18, 2014, after the person knocked on the door twice and announced his presence. After shooting Stephens, Jr., the unknown assailant ran away and has not yet been apprehended. The plaintiffs sued the defendants for \$20 million, alleging negligent security caused the incident. After discovery, Mr. Brown countered the claims, showing that there was no evidence any additional security measure could have prevented the shooting when Stephens, Jr. opened his door voluntarily at 3 a.m. The trial court agreed and

granted the Motion for Summary Judgment. On June 29, 2020, the Georgia Court of Appeals affirmed the trial court's decision.

**Bill Wood and David Marshall of Hawkins Parnell & Young** in Atlanta secured a dismissal for Bentley Motors in a breach of warranty case in the U.S. District Court for the Northern District of Georgia. Plaintiff alleged that he experienced various defects following the purchase of a motor vehicle for an amount totaling more than \$280,000. Plaintiff claimed that the manufacturer breached written/express and implied warranties pursuant to Georgia's Commercial Code and the federal Magnuson-Moss Warranty Act; he also asserted a breach of contract claim and sought damages for revocation of acceptance. The defense duo filed motions to dismiss Plaintiff's initial and amended complaints, and on June 24, 2020, Judge Eleanor L. Ross dismissed all

claims in their entirety against Hawkins Parnell's client.

On August 24, 2020, the Georgia Supreme Court affirmed summary judgment obtained by **David C. Hanson of Weathington** in Atlanta, in a medical malpractice case. In 2017, the firm's physician-client was sued following a uterine fibroid embolization procedure with allegations that he violated the standard of care by failing to provide the patient post-procedure care. Following expert discovery, Mr. Hanson obtained a summary judgment ruling from the trial court that the physician was not liable based on the testimony of Plaintiff's expert witness. Plaintiff appealed and the Georgia Court of Appeals affirmed (354 Ga. App. 279). The Supreme Court of Georgia denied Plaintiff's petition for certiorari, upholding the rulings of the trial court and Court of Appeals. ♦

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# Welcome, New GDLA Members!

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

**Jeffrey Scott Adams**  
Hawkins Parnell & Young, Atlanta

**Nelofar Agharahimi**  
Swift Currie McGhee & Hiers, Atlanta

**Ryan Bell**  
Groth & Makarenko, Suwanee

**Christopher Lawrence Beerman**  
Swift Currie McGhee & Hiers, Atlanta

**Regan Cason**  
Young Thagard Hoffman Smith  
Lawrence & Shenton, Valdosta

**Aaron Youngjin Chang**  
Constangy Brooks  
Smith & Prophete, Macon

**Lucas Benjamin Cowan**  
Cowsert Heath, Athens

**Austin Ellis**  
Peters & Monyak, Atlanta

**Daniell Fink**  
Hall Booth Smith, Atlanta

**James Lewis Glenn**  
Hall Booth Smith, Atlanta

**Mary Diversi Hanks**  
Hanks Law Group, Atlanta

**Robert Christopher Harrison**  
Downey & Cleveland, Marietta

**Bryan Hausner**  
Worsham Corsi  
Scott & Dobur, Marietta

**Christian G. Henry**  
Hall Booth Smith, Athens

**Elizabeth "GG" Howard**  
Barrickman Allred & Young, Atlanta

**Ashley Hughes**  
Evins Oliver Hughes, Woodstock

**Lindy Zimmerman Kerr**  
Savell & Williams, Atlanta

**Jared Matthew Koebble**  
Young Thagard Hoffman Smith Lawrence  
& Shenton, Valdosta

**Douglas MacKimm**  
Groth & Makarenko, Suwanee

**Rachel Wilson Mathews**  
Swift Currie McGhee & Hiers, Atlanta

**Gary McGinty**  
Drew Eckl & Farnham, Atlanta

**Andrew Bryce Moody**  
Law Office of S.E. Moody III, Perry

**Alphonsie Nelson**  
Quintairos Prieto  
Wood & Boyer, Roswell

**Irav Pravin Patel**  
Drew Eckl & Farnham, Atlanta

**Jessica Patterson**  
Gray Rust St. Amand  
Moffett & Brieske, Atlanta

**Evan Schrode**  
Bendin Sumrall & Ladner, Atlanta

**Marshall Sims**  
Drew Eckl & Farnham, Atlanta

**Carmen R. Toledo**  
King & Spalding, Atlanta

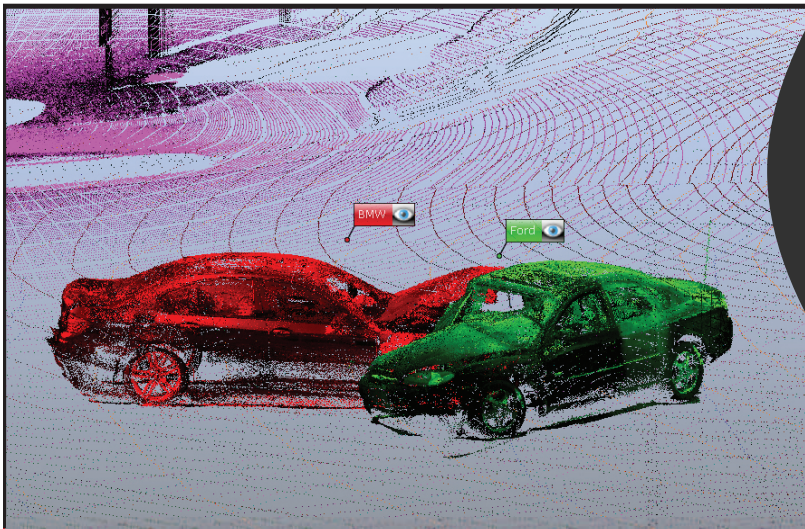
**Stuart Walker**  
Martin Snow, Macon

**Anna Waller**  
Goodman McGuffey, Atlanta

**Blake Williams**  
Hudson Parrott Walker, Atlanta

**William Taylor Wood III**  
Hawkins Parnell & Young, Atlanta

**D. Sarah Young**  
James-Bates-Brannan-Groover, Macon



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# GDLA Teams up with GTLA for Fundraiser: Donate Now to Mask Up For Justice!



GDLA and the Georgia Trial Lawyers Association (GTLA) have set aside their differences, crossed party lines and joined forces to establish Mask Up for Justice! This charitable effort will raise funds to provide supplies, including masks and personal protective equipment (PPE), for Georgia's courthouses to help them resume jury trials and operate safely during the pandemic.

The project was the brain-child of GTLA member Laura Voght whose sister is a front-line medical worker and subsequently contracted the COVID-19 virus. "Watching my sister and her colleagues struggle to obtain masks and sufficient PPE resonated with me in relation to my own profession as a trial lawyer, when I considered how the justice system would be impacted as courts move toward reopening and resuming jury trials," she said. Ms. Voght brought the idea to GTLA President Lyle Warshauer who embraced it and suggested getting GDLA on board.

GDLA President Jeff Ward explained, "Our side was ready and willing to be involved, since it is incumbent on all parties to litigation to ensure the wheels of justice keep turning. It's in our mission."

Visit [www.maskupforjustice.com](http://www.maskupforjustice.com) or click the logo on GDLA's homepage. to donate Thanks to the State Bar of Georgia Foundation for creating the donations site and processing them. Below are the levels:

- Heroes - \$10,000
- Warriors - \$7,500
- Fighters - \$5,000
- Defenders - \$2,500
- Protectors - \$1,000
- Supporters - \$500
- Leaders - \$250
- Helpers - under \$250

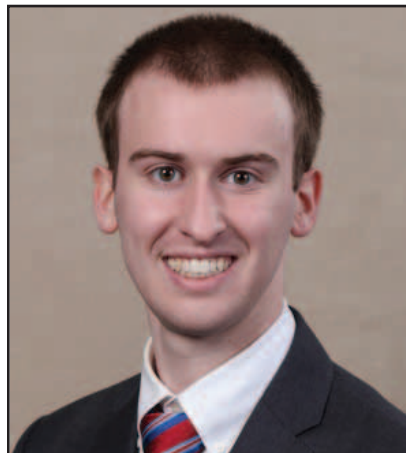
Donations are tax deductible. Donors will be showcased by level on both association websites and in printed material. ♦

## GDLA Law School Awards Presented

GDLA is honored to partner with two of the state's law schools to recognize the achievements of future lawyer leaders. Seventeen years ago, GDLA established an award at the University of Georgia School of Law in memory of one of GDLA's founding members and past presidents, and in 2016 created an award at Mercer Law School to honor a long-time Board of Directors member.

The Willis J. "Dick" Richardson, Jr. Student Award for Excellence in Georgia Practice and Procedure was established at the University of Georgia School of Law, from which Mr. Richardson graduated. This year's recipient was Wade H. Barron, who is currently clerking for U.S. District Court Judge R. Stan Baker in the Southern District of Georgia, Savannah Division.

GDLA created the Rusty Gunn Award in memory of Robert R. "Rusty" Gunn II at his beloved alma



**Wade H. Barron**

mat, Mercer Law School. He was known as a quiet, effective, often behind-the-scenes leader, as well as a respected, successful litigator at Martin Snow in Macon and a sought-after mediator. The award honors a student whose professionalism is his or her badge of honor and who quietly leads with



**Breanna McKnight**

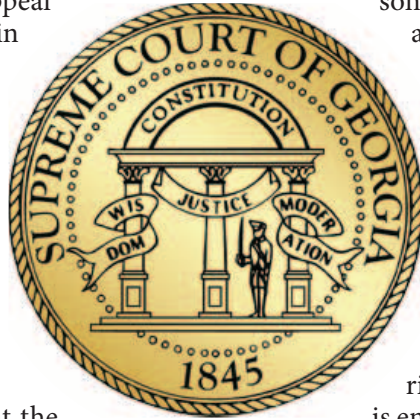
strength, intelligence and good humor. The annual honoree is also held in the highest regard by his or her fellow students and the faculty, and is someone whom others aspire to emulate. Breanna McKnight received this year's award; she is now working at the Newton County District Attorney's office. ♦

## GDLA Amicus Position Prevails in Supreme Court on Assumption of the Risk Case

On June 1, 2020, the Supreme Court of Georgia issued its opinion in *Daly v. Berryhill*, a case in which GDLA filed two amicus briefs. The high court reversed the Court of Appeals, which had reversed a jury's verdict for the defendants, a cardiologist and cardiology practice. The primary issue on appeal was whether the trial court had erred in giving the jury a charge on assumption of the risk. The plaintiff was a patient of the cardiologist who had open-heart surgery, then climbed into a deer stand just a few days later and allegedly fainted and fell to the ground below. One of the issues at trial was whether the defendant cardiologist had properly warned the plaintiff-appellant of risks attendant to the medication he was taking.

On appeal, the plaintiff argued that the trial court erred in charging the jury on assumption of the risk because there was no evidence that the plaintiff knew of any specific side effects of the medication he was taking. The Court of Appeals accepted that argument and reversed the jury's verdict and remanded for a new trial.

The defendant cardiologist and cardiology practice petitioned the Supreme Court for certiorari. GDLA was asked to file an amicus brief in support of the defendants-appellees at the cert stage. After the Supreme Court granted the petition for cert, GDLA was requested to again weigh in with another amicus brief in support of the defendants-appellees.



GDLA argued that the Court of Appeals erred in failing to find there was sufficient evidence to warrant an assumption of the risk charge in this case. In addition, and more specifically, GDLA argued that the Court of Appeals erred in ignoring the objective, "reasonable person" standard that applies to an analysis of assumption of the risk where a risk is objectively obvious. In its opinion, the Supreme Court agreed with those specific arguments and reversed the Court of Appeals, reinstating the jury's defense verdict.

Perhaps the most important thing about this decision is that it reiterates and reinforces the existence of an objective component in the assumption of the risk analysis. Where a risk is objectively obvious, the defendant is entitled to argue that the plaintiff assumed the risk of his injuries, even where there is no evidence that the plaintiff subjectively understood or appreciated that risk. This case also obviously has important implications for doctors and other medical professionals.

GDLA thanks Amicus Committee Chair Emeritus Marty Levinson of Hawkins Parnell & Young in Atlanta who wrote both amicus briefs in support of the defendant-appellee and assisted at oral argument. GDLA members Wiley Wasden and Sandra Foster of Brennan Wasden & Painter in Savannah won the case at trial and again at the Supreme Court level for the defendants-appellees. ♦



## SUICIDE AWARENESS

*from the State Bar of Georgia*

### DID YOU KNOW?

The Bar's Suicide Awareness Campaign has a dual purpose, directed toward lawyers and judges who are suffering from anxiety and depression and may be at risk for suicide, as well as all Bar members, who need to recognize the severity of the problem.

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# GDLA Scores Amicus Win in Supreme Court on Constitutionality of Active Tortfeasor Limitation

On June 30, 2020, the Supreme Court of Georgia issued its opinion in *Reid v. Morris*, a case in which the Court invited GDLA (among others) to weigh in on the constitutionality of the active tortfeasor limitation in Georgia’s punitive damages statute. It was covered in the *Daily Report’s* June 29, 2020 edition.

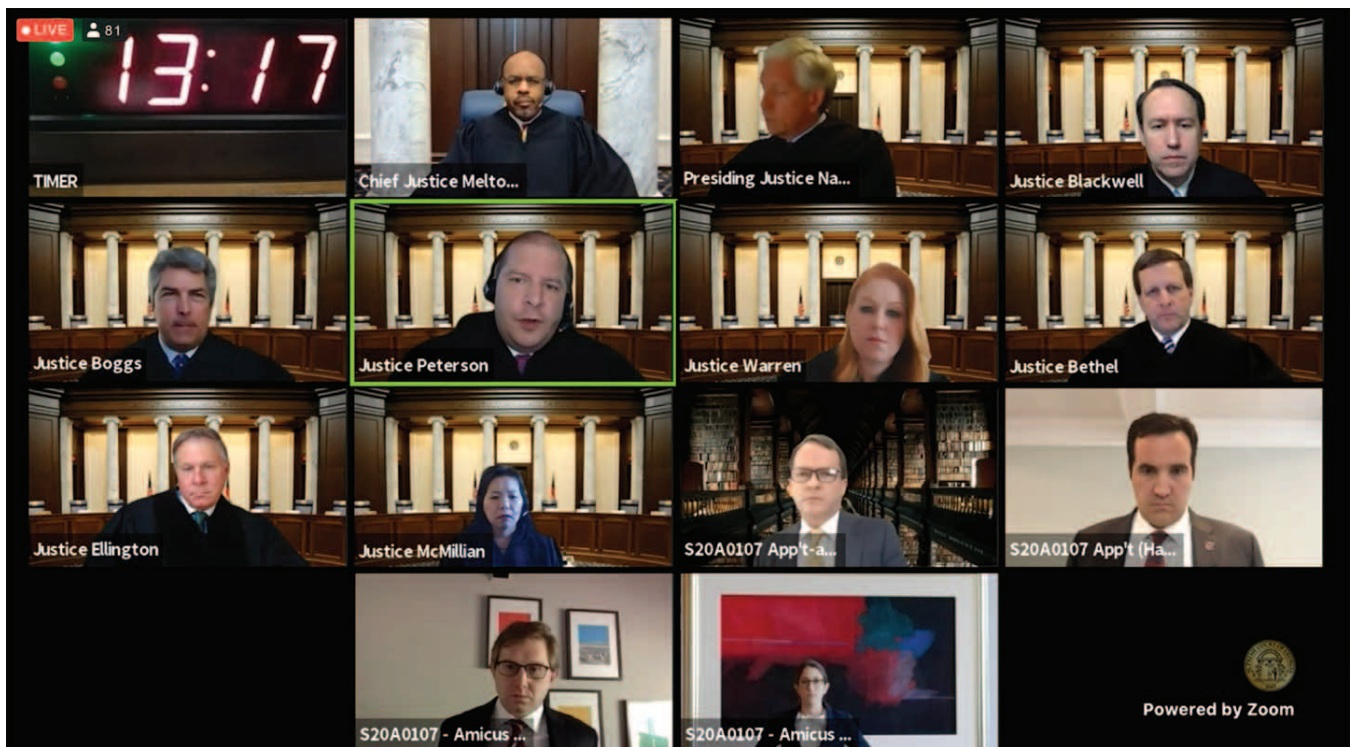
The case, which was a direct appeal from state court, arose from a motor vehicle collision involving the plaintiff and a drunk driver. The plaintiff also sued a second un-insured and unrepresented defendant for negligent entrustment of the vehicle the drunk driver was operating. The record revealed that the purported negligent entrustor had no involvement in entrusting the vehicle; he was actually in the hospital for surgery on the day in question. However, because that defendant was unrepresented and failed to respond to requests for admissions, he was deemed to have admitted various alleged facts on which the plaintiff’s negligent entrustment claim was based. The case culminated in a bench trial and an award of punitive damages of \$50,000 against the drunk driver but no punitive damages against the purported negligent entrustor.

The plaintiff appealed, challenging the trial court’s refusal to award punitive damages against the alleged negligent entrustor. Specifically, the plaintiff argued that the trial court had misinterpreted the “active tortfeasor” limitation of O.C.G.A. § 51-12-5.1(f) as interpreted by the Georgia Court of Appeals in *Capp v. Carlito’s Mexican Bar & Grill No. 1, Inc.*, 288 Ga. App. 779 (2007). The

plaintiff asked the Georgia Supreme Court to overrule *Capp* or, alternatively, to hold that O.C.G.A. § 51-12-5.1(f) unconstitutionally infringes on a plaintiff’s right to trial by jury and violates the separation of powers doctrine.

Despite Plaintiff and GTLA’s argument that the active tortfeasor limitation violated Georgia’s Constitution, the Supreme Court declined to reach the issue. The Court likewise refrained from commenting on whether a negligent entrustor can qualify as an active tortfeasor under subsection (f). Instead, the Court emphasized the important distinction between tort defendants who “acted” and those who “failed to act.” Specifically, the Court stated that O.C.G.A. 51-12-5.1(f) suggests that an “active tortfeasor” is a defendant who engages in an affirmative act of negligence or other tortious conduct, as opposed to a defendant whose negligence consists of an omission to act when he is under a legal duty to act.” Ultimately, the Court remanded the case for a determination of whether the supposed entrustor was an “active tortfeasor” within the meaning of the punitive damages statute.

GDLA thanks Amicus Committee Chair Elissa Haynes of Drew Eckl & Farnham in Atlanta and Vice President and Amicus Chair Emeritus Marty Levinson of Hawkins Parnell & Young in Atlanta for their efforts preparing the brief. The Court of Appeals held oral argument on April 22, 2020 via Zoom and Ms. Haynes argued on GDLA’s behalf (screenshot below). ♦



# GDLA Files Second Amicus on Applicability of Judicial Estoppel Doctrine Where Plaintiff Amends Bankruptcy Schedule in Response to a Dispositive Motion

On December 23, 2019, GDLA filed an amicus brief in the Supreme Court of Georgia in support of defendant's petition for *certiorari*, arguing that Court of Appeals should be reversed since the trial court acted properly in granting summary judgment in a case regarding the application of the judicial estoppel doctrine.

In the case, *Fulton County, Georgia v. Sandra Ward-Poag*, Georgia Supreme Court, Case No. S19C1619, the trial court applied federal law in determining that the plaintiff had made a mockery of the court through her failure to disclose her claim in a contemporaneously pending bankruptcy proceeding. The high court granted cert on February 28, 2020, and GDLA filed another amicus brief on March 30, 2020.

Specifically, the case concerns whether the plaintiff was properly barred from bringing a claim against the defendant where she omitted that claim from disclosure in a previously filed bankruptcy case until defendant filed a dispositive motion, then failed to include a proper valuation of the claim in her effort to amend her bankruptcy pleadings after the dispositive motion was filed.

In May 2013, the plaintiff filed a voluntary petition for Chapter 13 bankruptcy. While the petition was pending, the plaintiff allegedly objected to improper behavior on the part of one of the defendant Fulton County's commissioners. As a result, she alleged that she was demoted and faced other forms of retaliation. In August 2016, the plaintiff sent ante litem notice of her whistleblower claim to the defendant and thereafter filed a lawsuit in October 2016. On

September 5, 2017, the defendant filed a motion for summary judgment, pertinently arguing that judicial estoppel barred the plaintiff's claim because she failed to disclose her cause of action against the defendant as an asset in her bankruptcy proceeding. The plaintiff then filed an amended bankruptcy schedule on October 2, 2017, in which she identified her cause of action against the County as an

“

*Georgia precedent established that the judicial estoppel doctrine is no longer applicable once a debtor amends her bankruptcy filings to include the previously omitted claim.*

”

asset worth \$1.00 despite asserting before the trial court that her claims total \$3.0 million.

Before the trial court, the defendant argued that federal law applied and that under the recent Eleventh Circuit decision *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc), the defendant could not establish that plaintiff acted with intent to make a mockery of the judicial system. The trial court applied Slater but disagreed with the plaintiff, explicitly finding that plaintiff acted with intent and made a mockery of the court based on several factors and granting the defendant's motion for summary judgment.

The Court of Appeals reversed, determining that regardless of whether Slater applied, Georgia precedent established that the judicial estoppel doctrine is no longer applicable once a debtor amends her bankruptcy filings to include the previously omitted claim. The court also determined that the plaintiff's valuation of her claims at \$1.00 did not affect its analysis.

In its first amicus brief supporting the defendant's petition for certiorari, GDLA argued that Georgia case law recognizes judicial estoppel's nature as a federal doctrine and has routinely looked to federal law to inform application of that doctrine in Georgia courts. GDLA further argued that federal law, particularly in the Eleventh Circuit, imparts considerable discretion on trial courts to consider facts pertinent to the debtor's intent in failing to make the appropriate disclosure, regardless of whether the debtor amends her bankruptcy filings in response to a dispositive motion, and that the trial court properly exercised its discretion. GDLA suggested encouraging candor from litigants involved in contemporaneous bankruptcy proceedings at all times, not simply when potential deception is revealed in a dispositive motion. In granting certiorari, the Georgia Supreme Court indicated that the parties were to brief whether the trial court abused its discretion in applying the judicial estoppel doctrine.

We thank the author of both briefs, Amicus Committee Vice-Chair Philip Thompson of Ellis Painter in Savannah, for his service to GDLA. ♦

## GDLA Filed Amicus Brief in Pivotal Apportionment Case, Including Another in Petition for Cert

On July 13, 2020, GDLA filed a second amicus brief in *Alston & Bird LLP v. Hatcher Management Holdings, LLC* (2020 WL 2569714, No. A202018)—this time in the Georgia Supreme Court in support of a petition for certiorari. The earlier amicus brief in support of en banc reconsideration was filed on June 11 following the May 21 decision by the Court of Appeals that radically changes the apportionment landscape in Georgia to the detriment of defendants.

Unfortunately, the Court of Appeals denied the motion for reconsideration, so the defense team filed a petition for certiorari to the Supreme Court of Georgia and GDLA filed its amicus brief.

In the case, a three-judge panel of the Georgia Court of Appeals held that in single defendant cases, the percentage of fault apportioned to a non-party does not re-

duce the amount of damages attributable to the defendant. In other words, a single defendant is on the hook for 100 percent of the jury's damages award regardless of how the jury apportions fault to a non-party.

Both of GDLA's amicus briefs pointed out the panel's decision conflicts with prior precedent, misunderstands the statutory scheme embodied in Georgia Code Sections 51-12-32 and 51-12-33, and has far-reaching and unintended consequences for single-defendant apportionment cases.

GDLA thanks Laurie Webb Daniel of Holland & Knight in Atlanta for authoring our first amicus brief in this pivotal apportionment case. GDLA Amicus Vice-Chair Philip Thompson of Ellis Painter in Savannah authored the amicus supporting the petition for certiorari. ♦



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## GDLA Files Amicus Brief in 11th Circuit Case Raising Important Apportionment Issue

On July 16, 2020, GDLA moved for leave of court to file an amicus brief in support of a petition for interlocutory appeal filed by Renasant Bank in *Renasant Bank v. Landcastle Acquisition Corp.*, No. 20-90013 (11th Cir. June 18, 2020). Leave was granted on August 10, 2020.

One of the two legal questions that Renasant seeks to appeal-and the question on which GDLA seeks to file an amicus brief-concerns the district court's conclusion that damages arising from tort claims for conversion cannot be apportioned under O.C.G.A. § 51-12-33 because fault for conversion is indivisible as a matter of law. That conclusion could have significant, negative ramifications for GDLA members and their clients if not reversed on appeal.

The lawsuit arises out of the criminal conduct of Nathan E. Hardwick IV, an imprisoned former Georgia real estate lawyer. In 2009, Hardwick got a personal loan for nearly \$650,000 from Crescent Bank & Trust Company and secured its repayment by depositing funds with Crescent in exchange for a certificate of deposit-titled in the name of Hardwick's law firm-and pledging the CD funds to Crescent. Hardwick signed the hypothecation agreement in his capacity as manager of the law firm.

In 2010, Crescent failed and the FDIC became its receiver. The FDIC sold Crescent's assets to Renasant Bank, and those assets included the loan to Hardwick and Crescent's rights in the CD under the hypothecation agreement.

Hardwick's former law partners dispute that Hardwick was authorized to purchase a CD with the law firm's funds and to pledge those funds to secure Hardwick's personal loan, but they don't dispute that the loan records in Crescent's possession at the time of its failure (and available for inspection by Renasant in connection with its purchase of Crescent's assets) did not reveal any lack of authority.

Hardwick defaulted on the loan. In 2014 Renasant, exercising its rights under the hypothecation agreement, applied the CD funds in partial payment of Hardwick's outstanding loan balance.

The successor in interest to Hardwick's law firm filed for bankruptcy protection and, as part of the bankruptcy process, assigned its recoupment claim to recover the pledged CD funds to Landcastle Acquisition Corp.

After the FDIC denied Landcastle's administrative claim to recover the funds, Landcastle sued Renasant in federal court in the Northern District of Georgia, alleging, among other claims, a tort claim for conversion against Renasant-premised on the assertion that Renas-

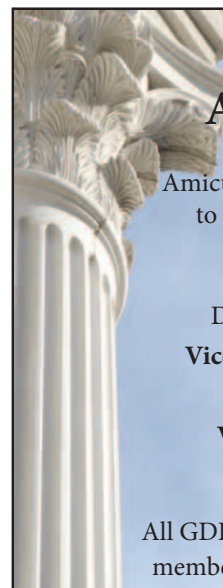
ant converted the CD funds when it used them to partially set off the amount owed Hardwick's loan.

In its answer to Landcastle's complaint, Renasant asserted that any damages should be apportioned under O.C.G.A. § 51-12-33 to "other people or entities, including one or more non-parties."□ Landcastle moved to strike that defense, arguing that "fault" for the tort of conversion is indivisible as a matter of Georgia law and that, as a result, damages for any such claim cannot be apportioned under the statute. The district court granted Landcastle's motion, struck Renasant's apportionment defense, and thereafter certified that its ruling on this issue satisfied the criteria for interlocutory appeal under 28 U.S.C. § 1292(b).

Renasant petitioned for interlocutory appeal in the Eleventh Circuit seeking review of the district court's apportionment ruling (and one other important issue of federal banking law).

In support of Renasant's petition, GDLA's motion and proposed amicus brief argue that the district court's ruling-that damages for conversion claims are ineligible for apportionment because fault for conversion is indivisible-flouts the Georgia Supreme Court's recent interpretation of O.C.G.A. § 51-12-33 in *FDIC v. Loudermilk*, 305 Ga. 558 (2019, finds no support in Georgia law, and threatens widescale harm and inequitable results to the clients of GDLA members. If Renasant's petition for review is granted on this issue, GDLA plans to move for leave to file an amicus brief at the merits stage of the appeal, in which these and other of GDLA's arguments will be presented in greater detail.

Thanks goes to Stuart Walker of Martin Snow in Macon who authored the brief. ♦



**GDLA**  
**Amicus Program**

Amicus brief requests should be directed to the GDLA Amicus Committee:

**Chair Elissa Haynes**  
Drew Eckl & Farnham, Atlanta

**Vice Chair Anne Kaufold-Wiggins**  
Balch & Bingham, Atlanta

**Vice Chair Philip Thompson**  
Ellis Painter, Savannah

All GDLA amicus briefs can be found in the members' only area under the amicus tab.

A close-up photograph of a hand moving a dark wooden chess piece on a board. Other chess pieces are visible in the background, some in focus and some blurred.

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

## GDLA Files Second Amicus in Support of Cert in Pivotal Personal Jurisdiction Case

On September 4, 2020, GDLA filed an amicus brief in support of Cooper Tire’s petition for certiorari in *Cooper Tire & Rubber Company v. McCall*, No. S20C1368 (Ga. Sup. Ct. June 22, 2020).

The case arises out of an automobile accident that occurred in Florida. In the lower court, the plaintiff—a Florida resident—alleged that one of Petitioner’s tires contributed to the accident.

Although the accident occurred in Florida, the tires were constructed in Arkansas and Cooper Tire is a Delaware corporation headquartered in Ohio, the plaintiff was able to file suit in Georgia under existing Georgia precedent to take advantage of Georgia’s seat-belt law.

At the trial level, Cooper Tire moved to dismiss on the grounds of personal jurisdiction under controlling Supreme Court of the United States precedent. The trial court agreed. The Georgia Court of Appeals then reversed this decision, holding that Cooper Tire’s registration to do business in Georgia was sufficient to assert general personal jurisdiction over the foreign corporation under Georgia Supreme Court case, *Allstate Ins. Co. v. Klein*, 262 Ga. 599 (1992).

As it stands, this decision ignores a subsequent line of U.S. Supreme Court decisions that make clear that general personal



**GDLA’s amicus brief argues that Georgia must revisit *Allstate Ins. Co. v. Klein* to ensure that our state complies with the controlling interpretation of the U.S. Constitution.**

jurisdiction can only be conferred over corporations where that corporation is found to be “at home,” i.e. the corporation’s place of incorporation, principal place of business or in exceptional cases where the corporation’s contacts are so great with a state that it renders the corporation essentially at home in that state. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 2549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915 (2011).

Eight state supreme courts have considered this issue in the wake of the U.S. Supreme Court precedent, and all eight have aligned themselves with the controlling precedent. Similarly, the courts in the 2nd, 3rd, 4th, 5th, 9th and 11th circuits all agree that mere registration to do business in a state is insufficient when asserting general personal jurisdiction over a foreign company.

GDLA’s amicus brief argues that Georgia must revisit *Klein* to ensure that our state complies with the controlling interpretation of the United States Constitution. Allowing any corporation that is registered to do business in Georgia to be hauled into court in our state provides no benefit to this state. Rather, GDLA explains that this decision will result in judiciary overcrowding, improper forum shopping, economic hardship and Fourteenth Amendment due process violations.

This is not an instance where Georgia benefits from being an outlier, and the GDLA brief urges the Georgia Supreme Court to follow the lead of sister states and federal district courts in aligning Georgia law with U.S. Supreme Court precedent.

GDLA thanks David Hanson and Zach Fuller of Weathington in Atlanta who authored the brief. ♦

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# Jeff Ward Takes the Helm as 53rd GDLA President

## *New Officers Installed and Awards Presented*

While the transition to new leadership should have taken place during the 53rd GDLA Annual Meeting at The Breakers in Palm Beach, Fla., which was canceled due to COVID-19, Jeffrey S. “Jeff” Ward of Drew Eckl & Farnham in Brunswick instead took the helm as the GDLA President during a Zoom Board meeting on June 5.

Other officers assuming duties were President-Elect George R. Hall of Hull Barrett in Augusta; Treasurer James D. “Dart” Meadows of Balch & Bingham in Atlanta; and Secretary Pamela N. Lee of Swift Currie McGhee & Hiers in Atlanta. Martin A. “Marty” Levinson of Hawkins Parnell & Young in Atlanta was elevated to be one of four Vice Presidents; he formerly served as a Northern District Board of Directors member. Brannon J. Arnold of Weinberg Wheeler Hudgins Gunn & Dial in Atlanta became the latest addition to the Board, having been elected to an at-large seat.

Later in the summer, dedicated Board member Tracie Macke, then with Savannah’s Brennan Wasden & Painter, resigned to become the court administrator/deputy clerk at Chatham County Magistrate Court. The Executive Committee moved Tracy O’Connell to serve her unexpired term as a Southern District rep, and appointed Marcia Freeman of Walden Adelman in Atlanta to fill Tracy’s one-year at-large term.

Jacob E. “Jake” Daly was honored by outgoing President Dave Nelson with the President’s Award. Jake was recognized for his tireless efforts as chair of GDLA’s Legislative Committee. He provided eblast updates during the session, vetted bills that would impact the civil defense bar, and generally kept us apprised of happenings under the Gold Dome. You will find his latest work on page 34 where he reports on the final outcome of bills after



Jeff Ward was installed as the 53rd GDLA President via Zoom. The usual cover photo of officers also did not occur due to COVID-19. On the next pages, you will see how we have attempted to make up for many of the special traditions that were missed this year during the leadership transition. Above are Jeff’s three magazine covers as an officer (left to right). The first being after he was sworn-in as Secretary in 2017 at The Breakers. Next was when he was installed as Treasurer at Hammock Beach Resort in 2018. Last year in Ponte Vedra, he was elevated to President-Elect.

July 1. Mr. Daly is of counsel at Freeman Mathis & Gary in Atlanta.

William G. “Bill” Scrantom, Jr., who not only helped found GDLA in 1967, but also served as President from 1972-1973 was honored with the GDLA Distinguished Service Award. GDLA would not be where it is today without the visionary leadership of lawyers like Bill. He continues to attend Board meetings, judicial receptions and past presidents’ luncheons. He is retired from the Columbus firm that bears his name—Page Scrantom Sprouse Tucker & Ford.

After receiving the crystal award via mail because of the pandemic, Bill said, “I was so touched with being remembered in such a meaningful way. I thank all the members for this honor at this time of my life. It is so thoughtful and prideful to me. I remember so warmly the years of my involvement with GDLA. We had a great time together.”

During GDLA’s 50<sup>th</sup> Anniversary year, Past President Morton G. “Salty” Forbes of Forbes Foster & Pool in Savannah, penned a history of the Association. It is posted on our website under “About Us.” As

part of that, we asked GDLA Past Presidents to answer a few questions about their experience with GDLA. Following are Bill’s responses:

*How did you become involved with GDLA?* I received an invitation to attend an organizational meeting at the Travel Lodge Motel in Atlanta in 1967. Previously a small group had met and come up with the idea of an association. When I arrived at the motel, I saw a lot of my friends; the meeting was led by Jack Capers and Dick Richardson. That’s when we put the Association together. I was honored to serve as the fifth President.

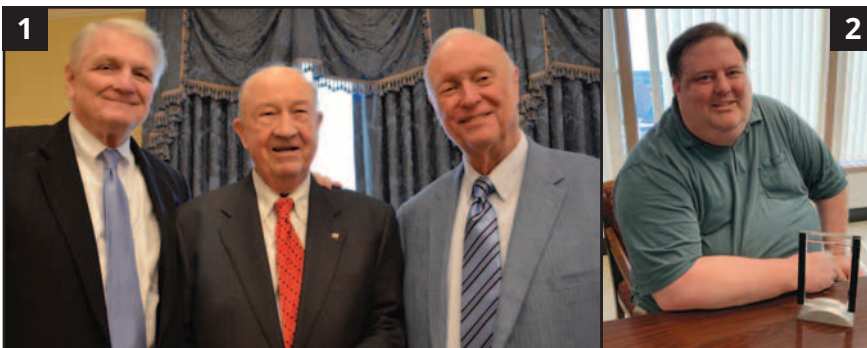
*What is your favorite GDLA memory?* In the beginning, Annual Meetings were held at Port Royal Resort on Hilton Head Island. We took over most of that particular resort, which was on the water but also had a golf course. When I found out I couldn’t break 120, I quit playing golf! John Gayner and our wives always reserved our rooms together—either as a two-bedroom suite or adjoining rooms.

At Port Royal, our rooms were on the 18th hole. We bought beer and when people would come off

the course, they'd come to our porch and have a cold beverage. Port Royal is where it all began and we met there for several years, and then Dick Richardson began to shop around for other venues.

Wherever we were, we followed that model: after the main dinner, everyone would generally gather in the Gayners' and our rooms. We would sit in the living room and start telling jokes. George Grant was the king of joke tellers. Jim Hill was also there in the early years and was very much a part of the defense lawyers group before going on to serve as an 11th circuit federal judge.

Our joke sessions would go on until 2 a.m. at least—and we weren't drinking milk! Cubbedge Snow and Frank Love were regular fixtures then, too, with their wives. One time we went to Hounds Ears, North Carolina, for a meeting and snow skiing. Frank was not very adept on skis and neither was my wife, Polly. Once those two were coming down the beginner slope and crashed into each other. That



1. President's Award winner Bill Scrantom (right) is pictured at the 2017 GDLA Past Presidents Luncheon with his friends and fellow Past Presidents Pat Rice (left/1989-1990) and Wilbur Warner (1990-1991); 2. Jake Daly received the President's Award for his extraordinary work over the past several years as GDLA's Legislative Chair.

ended their skiing careers! I also fondly recall trips to Amelia Island and the Biltmore Country Club in Asheville. At the latter, I remember playing tennis with Marcia Welch, Bruce's wife. She was a great tennis player, who also happened to do all my Atlanta deposition work. I believe we played with Dick Richardson or Jack Capers.

Anything else you would like to share? GDLA has always been very a fraternal group—everyone was

close. For example, Frank and Libby Love came down to visit Polly and me on several occasions, and the four of us met up in France one time. As fate would have it, Frank's funeral was on Saturday after we had our Past Presidents Luncheon this past February (2017). I stayed with Bo Chambers and his wife, and we went to the memorial service. It was wonderful to see so many of my old GDLA friends there. ♦

## 2020-2021 OFFICERS AND BOARD OF DIRECTORS

### OFFICERS

#### President

Jeffrey S. "Jeff" Ward  
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James D. "Dart" Meadows  
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*(Includes the officers and three most recent past presidents)*

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*Waldon Adelman Castilla Hiestand & Prout, Atlanta*

Anne D. Gower  
*Gower Wooten & Darneille, Atlanta*

Daniel C. "Dan" Hoffman  
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Garret W. Meader  
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Joseph D. "Joe" Stephens  
*Cowsert Heath, Athens*

# SPOTLIGHT ON GDLA'S OFFICERS

*GDLA interviewed each of its four officers so you can get to know your leadership. President Jeffrey S. "Jeff" Ward is a partner at Drew Eckl & Farnham in Brunswick:*

**Tell us about your legal background—law school to present.** After a short-lived environmental career working in the great outdoors, I attended the University of Georgia School of Law. I began my legal career in Brunswick at Gilbert Harrell Sumerford & Martin and was fortunate to have been mentored by a group of terrific lawyers, including Judge Wallace E. Harrell, Jr., Judge Lisa Godbey Wood, Rees Sumerford and Mark Johnson. It was an amazing place to "grow up"

in the law. Thanks to GDLA Past President Hall McKinley, I have now had the great fortune of working with a wonderful team at Drew Eckl & Farnham on the coast since 2012. About five years ago I started mediating cases as a neutral. Working with both sides to seek common ground is so rewarding, and I find it especially humbling when a former adversary asks me to mediate for his/her client.

**How did you get involved with GDLA?** As perhaps a second-year lawyer, Wallace Harrell suggested I attend what was then called Trial Academy. Then, in 2010, my dear friend Sally Akins recommended me for a Southern District Board of

Directors seat—the rest is history. Coming full circle, I now serve on the Trial & Mediation Academy faculty. It's an honor to teach, mentor and learn from students, as well as the rest of the esteemed faculty.

**If you had to choose a different profession, what would you do?** Definitely something outdoors! Golfer (not good enough), hunting guide (not independently wealthy) or fishing guide (not lucky enough), but one can dream.

**What is the most rewarding part of your career?** For me, it's the lifelong friendships that have grown from my interactions with lawyers on both sides of the "v."



1. Jeff at age 17 working on his family's ranch in Colorado; 2. Jeff and Jennifer at The Breakers in 2020; 3. Jeff and Jennifer at Pebble Beach Golf Links in 2018; 4. Beth Anne, Jennifer and Jeff before a UGA game in 2019; 5. Wedding day for Jennifer and Jeff with Mobley, Beth Anne and Bennett; and 6. Jeff with (left to right) Past Presidents Walter McClelland, Matt Moffett, Staten Bitting and Bubba Hughes.

# PRESIDENT JEFFREY S. “JEFF” WARD

**What do you wish you had known when you first started practicing?**

The practice of law truly is a community regardless of your practice area. Get to know your colleagues and peers as those relationships are invaluable and, as I mentioned before, many will become friendships that will last a lifetime.

**Did you have any interesting jobs growing up?**

I guess the “job” that I look back on with the best memories, and greatest impact on my character formation, was working on my family’s cattle ranch in

Southwestern Colorado. It certainly didn’t pay great—or anything for that matter—but the life lessons learned from interacting with livestock have certainly come in handy while practicing law.

**Do you have a favorite concert? Favorite movie?** Concert is a tie: Van Halen (with Sammy Haggar) and George Strait. Movie favs are *The Outlaw Josie Wales*, *The Man from Snowy River* and *Tin Cup*.

**Hobbies and/or favorite travel destination.** Golf, hunting and

fishing. Favorite destination is anywhere in the mountains or woods or near any kind of water.

**Tell us about your family.** I got to marry my best friend—GDLA Executive Director Jennifer (Davis) Ward—in August 2019 after we both relocated to Savannah. We are kept busy with three wonderful children: Bennett (22), Beth Anne (16) and Mobley Grace (7).

**Who do you root for on college gameday?** Gooooooo, Dawgs!!



7. Jeff and Past President Walter McClelland at the 2012 Annual Meeting golf tournament; 8. Jeff at the 2011 Fall Meeting; 9. Jeff with the late Rusty Gunn at the 2012 Fall Meeting; 10. Jeff with (now) Past Presidents Matt Moffett (left) and Hall McKinley, his law partner, at the 2016 Spring Meeting; 11. Jeff teaching at the 2017 Trial & Mediation Academy; 12. Jeff and Jennifer (then Davis) at the 2017 State Bar Annual Meeting receiving the Best Newsletter Award from then-Bar President and GDLA member Pat O'Connor; 13. Jeff and Past President Ted Freeman at the 2017 Annual Meeting; 14. Then-President Sally Akins presented Jeff with the President’s Award at the 2018 Annual Meeting for his work editing the newsletter for 3.5 years; 15. Jeff and Jennifer with his law partners, Karen Karabinos and Douglas Burrell, at the 2018 DRI Annual Meeting; 16. Jeff with State Bar Past President and GDLA member Robert Ingram at the 2019 Judicial Reception; 17. Jennifer and Jeff with his mentor, Judge Wallace Harrell, and his wife, Mary, at the U.S.D.C. Southern District Courts Advisory Council Meeting in 2019; and 18. Jeff with U.S. District Court Judge Tripp Self at the 2019 Annual Meeting.

# SPOTLIGHT ON GDLA'S OFFICERS

*GDLA interviewed each of its four officers so you can get to know your leadership. President-Elect George R. Hall is a partner at Hull Barrett in Augusta.*

**Tell us about your legal background—law school to present.** I graduated from the University of South Carolina Law School in 1986. I joined Hull Towill Norman & Barrett in Augusta 1986, and I have practiced with the firm since that time. The firm is now known as Hull Barrett. I immediately began to work with three great mentors: Pat Rice, David Hudson and Neal Dickert. Pat is a Past President of GDLA and Neal was a long-time Board member before he went on the Superior Court bench. I have always done a wide variety of defense cases. In my early days, I tried many automobile accident cases, which was a great training ground. Today, I handle a good bit of defense work for one of the railroads, as well as a wide variety of other matters. I began mediating cases in 1999, and I have mediated approximately 350 cases now.

**How did you get involved with GDLA?** I first became involved with GDLA through (what was then called) Trial Academy, which I attended in 1987. Jerry Blackstock was my group leader at Trial Academy and Dave Burch was the President of GDLA that year. I then attended my first Annual Meeting in 1988 or 1989 at Hilton Head when Pat Rice of our firm was President. I recall meeting Peter Muller at my first meeting as he was the only person anywhere near my age. The Annual Meeting in those days was in April.

**If you had to choose a different profession, what would you do?** If I had to choose a different profession, I would probably be a forest ranger, teacher or coach. When I was in high school, we had to take

an aptitude test that determined what would be our best career path based on our abilities and interests. My test results indicated that I should be a forest ranger. I have always loved the outdoors, so I think that would have been an interesting job. When I went to college, I thought about teaching and coaching before I became interested in law school.

**What is the most rewarding part of your career?** One of the most rewarding parts of my career is the competition of a lawsuit. I was a competitive runner in high school and college and trial practice is a natural fit for my personality. I was honored to be inducted as a Fellow in the American College of Trial Lawyers in 2016. I also have found rewarding my experiences as a mediator. I have been able to help many lawyers and parties resolve routine and difficult cases over the last 21 years.

**What do you wish you had known when you first started practicing?** Things take time. I have also learned that you must keep moving forward and

not let minor setbacks get you down. If you try cases, you will lose some. I was also taught by my mentors that you should treat everyone with respect and be willing to make reasonable accommodations to your opponents. An extension of time is not a sign of weakness. It is a common courtesy. Learn to laugh at yourself and do not take yourself too seriously. A sense of humor really helps in our profession.

**Did you have any interesting jobs growing up?** I had a wide variety of jobs growing up which taught me to respect what everyone does for a living. I worked at a Boy Scout



# PRESIDENT-ELECT GEORGE R. HALL

camp for three summers. I spent a summer stringing barbed wire and clearing fence lines which was the summer I decided to go to college. I also was a bus boy and dishwasher at an IHOP in high school, and I worked at a movie theater during college. I was also a painter's helper one summer. In law school, I worked for a small firm and a big firm in Columbia, S.C. I also worked for the South Carolina Lieutenant Governor's Office one Fall while attending law school.

**Do you have a favorite concert? Favorite movie?** My favorite concert would have been Boston or Fleetwood Mac. I was almost killed at a riot at a Blue Oyster Cult concert during my junior year in high school, but that is a different story for a different day. My favorite movies are *Unforgiven*, *Caddy Shack* and *Airplane*.

**Hobbies and/or favorite travel destination.** I enjoy running, swimming and hiking. I have run one marathon and six to eight half marathons. I have participated as the swimmer for an Iron Man relay team for the last few years. I also enjoy fishing and hunting. Duck hunting is my favorite hunting activity. Margaret and I love to travel. We especially enjoy visiting different ballparks in our travels. We have been fortunate to travel throughout the United States and other countries. My goal is to travel to all 50 states; I have currently been to 33. My favorite big cities are Toronto and London. We were also fortunate enough to visit Bermuda with GDLA in the early 90s.

**Tell us about your family.** I have been married to the love of my life, Margaret Carr Hall, since 1985.

We met in college in the Fall of 1980 and have been together since then. We have two sons, Thomas (28) and David (26). Thomas is a recent graduate of the Master's Program at East Carolina University. His Masters is in Public History. David is a graduate of the University of Georgia. He currently works as a Risk Analyst for Beecher Carlson in Atlanta. David is married to a wonderful young lady he met at UGA, Lauren Hall. They were married in October 2018.

**Who do you root for on college gameday?** I continue to be a long-suffering University of South Carolina fan. I love my Gamecocks dearly, although they constantly break my heart. Margaret and I are also loyal alumni of Presbyterian College—Go Blue Hose!



1. The Halls are lookin' fabulous and ready for a family wedding; 2. Go, Gamecocks!—COVID-19 style; 3. George and his son, David, finishing a road race in 2020; 4. Mr. and Mrs. George Hall on June 8, 1985; 5. George and Margaret at their son, David's, wedding to Lauren, along with their other son, Thomas, in 2017; 6. George with Judge Bobby Chasteen at the 2012 Annual Meeting; 7. Jim Purcell and Bill Horlock with George at the 2014 Annual Meeting; 8. Sally Akins and George at the 2018 Judicial Reception; 9. Past Presidents Bubba Hughes, Hall McKinley and Staten Bitting (right) with George at the 2017 Fall Meeting; 10. During the cover shoot of the 2018 officers for this magazine: Secretary George Hall, President-Elect Dave Nelson, President Hall McKinley and Treasurer Jeff Ward; 11. "Cover boy" George is ready for his magazine glamour shot; 12. George and Pat O'Connor at the 2019 Judicial Reception in Savannah; and 13. George with Past President Steve Kyle at the 2017 Spring Meeting.

# SPOTLIGHT ON GDLA'S OFFICERS

*GDLA interviewed each of its four officers so you can get to know your leadership. Treasurer James D. "Dart" Meadows is a partner at Balch & Bingham in Atlanta.*

**Tell us about your legal background—law school to present.** I grew up in Charleston, W.V. and graduated from the West Virginia College of Law in 1983. Edgar F. (Hike) Heiskell was a lawyer friend in Morgantown, W.V. who attended UVA law school and several of his classmates were practicing in Atlanta, including Bud Simpson at (what was then) Powell Goldstein Frazer & Murphy. I got a job as a first-year associate in the fall of 1983. I practiced there until March 1992 when three of us left and started Meadows Ichter & Trigg. Mike Bowers joined us after he stepped down from his position as Attorney General and ran for Governor in 1998. We merged with Balch & Bingham in June 2003 becoming its Atlanta office.

**How did you get involved with GDLA?** Four lawyers I worked with and respected at Powell Goldstein were active in GDLA. Three served as GDLA President: Frank Love (1974-75), Gene Partain (1982-83) and Bob Travis (2007-08). Jerry Blackstock was my mentor at Powell Goldstein and was involved in the GDLA Trial Academy.

**What do you wish you'd known when you first started practicing.** One of the biggest lessons learned came from a law school professor who recommended being hard on the issues and soft on the people. He meant advance your client's position zealously and aggressively, but always be professional and polite with the other lawyers you deal with. It isn't always easy to do that, but the practice of law is more enjoyable when you get along with your adversary and avoid needless disputes. The other important lesson came from Bob Brinson who recommended "stop and smell the roses."

**What is the most rewarding part of your career?** I have a national practice representing woodworking and power tool manufacturers both domestically and internationally. This started from representing the US distributor of an Italian manufacturer in the mid 1980s. My practice involves a lot of travel which I have mostly enjoyed. I have defended several hundred cases in over 40 states. I have enjoyed the challenge of trying cases in other jurisdictions, as well as making friends throughout the US and abroad.

**If you had to choose a different profession, what would you do?** I probably would have done something in the tennis industry. I grew up playing competitively through college, taught tennis through law school, and have stayed active as a volunteer with USTA and the Friends of Bitsy Grant Tennis Center where I served as its President from 2017-19.



# TREASURER JAMES D. MEADOWS

**Did you have any interesting jobs growing up?** I taught tennis during the summers while I was in college at the Meadowbrook Recreation Club in Charleston, W.V. The club used to have red clay courts where I played when I was 12 years old. Later the courts were blacktopped and no one played there for years. After my freshman year in college, my first project there was to help with the court resurfacing. Someone else repaved the courts with a green surface, but my job was put down the lines on four hard courts. I used chalk, string and a roller that applied white paint. I had no previous experience with this. When I finished, there were several areas of paint that smeared and extended slightly beyond where the lines are supposed to go on a tennis court. For the next four summers when I worked at Meadowbrook this made it challenging to decide whether or not the ball should be called out

when it touched the part of the line that was not supposed to be there! After I finished my undergrad degree, I was the assistant tennis coach at LSU (1979-80) during graduate school and the following summer I taught tennis at the Inn and Tennis Club at Manito Wabing in Ontario, Canada before starting law school.

**Do you have a favorite concert? Favorite movie?** The first house I bought in 1985 was on Lake Forrest Drive near Chastain Park. We loved going to concerts at the Chastain Park, which were wonderful because of the outdoor experience and intimate setting. James Taylor was one of my favorites. My favorite movie is *Shawshank Redemption*.

**Hobbies and/or favorite travel destination.** I still play tennis on occasion and have more recently gotten the golf bug. Our favorite travel destination is Italy, including the Amalfi Coast and Tuscany.

**Tell us about your family.** My wonderful wife Carol Staaf Meadows and I have been married for 11 years. We were set up on a blind date in 2006 after meeting 23 years earlier on an airplane. Our blended family includes Carol's two daughters Melanie (23) and Holly (27) and my three sons, James (29), Chase (26) and Spencer (21). Holly, Chase and Melanie each graduated from the University of Georgia. Spencer is in his fourth year at TCU in Fort Worth Texas and Melanie is starting her second year of law school at Pepperdine in Southern California

**Who do you root for on college gameday?** Definitely the West Virginia University Mountaineers. My dad attended East Bank High School at the same time as NBA legend Jerry West. I was a baby when my dad attended pharmacy school at WVU in the late 1950s while West played at WVU. I have been a die-hard fan ever since.



1. Dart and Carol rafting with FDCC members on the Salmon River near Sun Valley, Idaho in 2019; 2. Carol and Dart at the IceBar in Stockholm in 2019; 3. On the cover of Park Living magazine in 2011 for volunteer work in the community: Chase, Melanie, Carol, Dart, Spencer, Holly and dog Andie; 4. At "home" on the tennis court; 5. Spencer's 2017 Mt. Vernon graduation along with his dad, Carol and Melanie; 6. Dart and Carol with Judge Henry Newkirk and Past President Lynn Roberson at the 2009 Annual Meeting; 7. Carol and Dart with Past President Jerry Buchanan and his wife, Carolyn, at the 2010 Annual Meeting; 8. Dart and Past President Salty Forbes at the 2013 Fall Meeting; 9. Dart and former Board member/turncoat Craig Avery at the 2015 Fall Meeting; 10. Past President Staten Bitting and Dart at the 2016 Spring Meeting; 11. Lookin' sharp at the 50th Annual Meeting in 2017; 12. Dart and Carol at the 2019 Fall Meeting with (l-r around the table) Past President Matt Moffett, Marty Levinson, then-President David Nelson, Past President Peter Muller, Lisa Muller, Past President Hall McKinley and Diane Moffett.

# SPOTLIGHT ON GDLA'S OFFICERS

*GDLA interviewed each of its four officers so you can get to know your leadership. Secretary Pamela N. Lee is a partner at Swift Currie McGhee & Hiers in Atlanta.*

**Tell us about your legal background—law school to present.** I grew up in a small town in Virginia. After graduating from the College of William and Mary, I graduated from Mercer Law School in 2006. My career began as an associate at what was then Hicks Casey & Foster (later Hicks Casey & Morton). I moved over to Swift Currie in 2006 and have been there since. When away from the office, I somehow have managed to keep up with a lawyer husband, Chris Lee, and three pretty active kids.

**How did you get involved with GDLA?** I first joined GDLA in, I believe, 2007, when Bill Casey and Richie Foster sent me to Trial Academy. After a few years of being a member, but not really participating like I should, I joined the Education Committee which planned CLEs for GDLA. What a great and fun group we had! From there, I became the Chair of the Young Lawyers Section, before moving up to the Board of Directors a few years later. Since then, I have served as a Vice President for three years and am now the Secretary.

**What do you wish you'd known when you first started practicing.** The biggest lesson I have learned that has, I think, made me a better, happier and more effective lawyer is that it is perfectly fine to just be me.

As the old saying goes, “Just be yourself. Everyone else is already taken.” I was never comfortable in an all black suit—it’s okay to wear a bright jacket or fun shoes if the occasion permits. I don’t have to pretend to play the part of the “Big Atlanta Lawyer.” It’s just fine, and perhaps more relatable, for the jury to know, or at least sense, that I’m just a country girl by background and by heart. A lot of female lawyers have been programmed from somewhere, I’m not sure where, to not bring up that they have kids. My clients know about, and some actually personally know, all my kids. I think it helps them know me. My kids have been to expert depositions, hearings, mediations and more way too many times at my of-

fice. Aside from that, I’ve learned that if I can get what I need from a plaintiff’s deposition in 45 minutes, I don’t need to draw it out for three hours, asking where the deponent’s mama went to high school. I don’t have to ask them about every medical record that has ever existed. Just because that’s the way some people like to take depositions doesn’t mean that’s the way I have to do it. I don’t have to pick fights with the other side just to pick fights. I try to get along with my opposing counsel and give them every courtesy possible as long as the kindness is returned and it doesn’t hurt my client’s interests. I don’t have to write a 50-page brief if three pages will do. I am more effective, and happier, when I practice law the way I like to prac-



# SECRETARY PAMELA N. LEE

tice law and don't worry too much about the way other people do things.

**What is the most rewarding part of your career?** The most rewarding part of my practice is getting results for my clients, especially when the expectations are low or I've tried something out of the box to get the results. When I tell a client to "just trust me," and they do, with great results, it makes it all worthwhile. It's also rewarding to see how much my children are interested in what I do and setting an example for them that hard work pays off.

**If you had to choose a different profession, what would you do?** In college, my backup plan was to be in the foreign service. I had an International Relations minor. These days, however, I think if I stopped practicing law, I would want to either own a prom/bridal dress store or an antique store.

**Did you have any interesting jobs growing up?** If you can call it a job, I was, ever so briefly, a hand model during my college days. You wouldn't know it now since I have reverted back to a childhood habit of fingernail biting (thanks, stress of being a lawyer), but many moons

ago you could find my hands on the packaging of items such as coffee makers and juicing machines. If you're wondering what the qualifications are, it involves having an olive skin tone that hides the veins in the hands, along with long fingers. Yes, I've heard the Seinfeld "oven mitt" jokes before, so you all can keep those to yourselves.

**Do you have a favorite concert(s)? Favorite movie(s)?** I actually have not been to that many concerts, but my favorite was a Poison/KISS concert I went to with my older sister years ago. Those were the bands that were popular when she was a teenager, so just to be with her and see her singing along to all the songs was great. While my favorite stand-alone movie is *Forrest Gump*, I am a bit of a nerd and I love all the *Star Wars* movies, Prequels included. These days, however, my family and I are working through watching all the *Avengers* movies in chronological order, so check back at the end of that series to see if I've made the switch from *Star Wars* to *Avengers*.

**Hobbies and/or favorite travel destination.** Having three small kids leaves little time for hobbies, other than watching them participate in

their hobbies and sports. However, you can find me, on occasion, holed up in my basement in front of either the embroidery or vinyl cutting machines monogramming or otherwise personalizing items for friends and family. I will monogram anything that doesn't move.

**Tell us about your family.** I grew up with only one sister, who was almost 14 years older than I was. I married Chris Lee, another lawyer and former GDLA member (he likes to tell me he was in GDLA before I was) in 2007. He is currently the General Counsel for Southeastrans, Inc. after spending 10 years doing defense work at Tisinger Vance in Carrollton. We have three children, Jackson (10), Addison (8) and Lillian (3). Most weekends you can find us at a ballfield somewhere.

**Who do you root for on college gameday?** Now that we're actually having a football season, we'll be rooting on the Georgia Bulldogs. I didn't grow up a football fan, so when I married a rabid Bulldogs fan, I adopted them. We've been season ticketholders for years. We'll also be rooting on the 5th and 6th grade team at Landmark Christian School where our son plays.



1. (l-r) Jackson, Lillian, Chris, Pamela and Addison; 2. The family with Chris' grandmother; 3. Pamela, Jackson and Past President Lynn Roberson at the 2012 Annual Meeting; 4. At the 2014 Annual Meeting; 5. Pamela with Zach Matthews and now-Court of Appeals law clerk Katie Dod at the GDLA young lawyers' bowling night in 2014; 6. Pamela at GDLA's 2015 Strategic Planning Retreat with Ashley Rice and facilitator John Trimble; 7. Zach and Tracy Matthews with Pamela and Jackson at the 2018 Spring Meeting; 8. Candis Smith, Lynn Roberson, Pamela and Addison at the 2016 Fall Meeting; 9. Pamela and Bill Casey (at left) with Past President Mel Haas and his wife, Linda, at the 2019 Spring Meeting.



# A Review of the 2020 Session of the Georgia General Assembly

By Jacob E. "Jake" Daly  
*Freeman Mathis & Gary, Atlanta*

The Georgia Constitution requires the General Assembly to meet each year for 40 legislative days commencing on the second Monday in January. Typically, the session adjourns each year in late March or early April, but 2020 has not been a typical year. This year, the session commenced on January 13 and was on track to adjourn in early April. What happened next is well known to everyone. On March 13, Speaker David Ralston and Lieutenant Governor Geoff Duncan suspended the session due to concerns about COVID-19. The session resumed on June 15, but by then many of the priorities from the beginning of the session had changed.

Based on the recommendations of the Senate Reducing Georgia's Cost of Doing Business Study Committee in its December 10, 2019 report, there was reason to be optimistic at the beginning of the session about various tort reform measures being enacted. By June 15, however, the interest in tort reform had been replaced with a need to pass a budget that accounted for lost revenue caused by COVID-19, a desire to pass a hate-crimes bill and other priorities.

One of these other priorities was to pass a bill providing immunity from civil damages for healthcare providers and other businesses that are sued by employees, customers, visitors and patients who are infected with COVID-19.

When the General Assembly adjourned on June 26, it had passed 281 bills (197 of which originated in the House and 84 of which originated in the Senate) and 9 resolutions having the force of law (8 of which originated in the House and 1 of which originated in the Senate). Governor Brian P.



Kemp signed 277 of the bills and vetoed four. He signed all nine of the resolutions. Summarized below are the bills and resolutions that are likely to be of particular interest to members of GDLA and their clients.

## Senate Bill 359: Georgia COVID-19 Pandemic Business Safety Act

When Governor Kemp began lifting restrictions on the ability of non-essential businesses to resume operations, many people worried about the potential legal liability associated with the inevitability of employees, customers, visitors and patients of healthcare facilities and providers and other businesses becoming infected with COVID-19.

The General Assembly considered several bills that would have provided immunity from such liability and SB 359 emerged as the ultimate winner. Known as the Georgia COVID-19 Pandemic Business Safety Act, the bill is codified at O.C.G.A. §§ 51-16-1 to -5. Most importantly, the Act confers immunity on healthcare facilities

and providers, other businesses and individuals from "COVID-19 liability claims" unless their actions showed gross negligence, willful and wanton misconduct, reckless infliction of harm or intentional infliction of harm. The Act also creates a rebuttable presumption of assumption of the risk by the claimant under certain circumstances.

For claims against a business or an individual for transmission of, infection by, exposure to or potential exposure to COVID-19 when the claimant is on the business's or the individual's premises, other than the premises of a healthcare facility, the claimant is presumed to have assumed the risk if the business or the individual issued a receipt or proof of purchase for entry that includes a prescribed warning. Alternatively, the claimant is presumed to have assumed the risk if there is a sign posted at the point of entry of the premises that includes a prescribed warning. For claims against a healthcare facility or a healthcare provider for transmission of, infection by, exposure to or

potential exposure to COVID-19 when the claimant is injured or dies at a healthcare facility or on the premises of a healthcare provider, the claimant is presumed to have assumed the risk if there is a sign posted at the point of entry of the facility or the premises that includes a prescribed warning.

These rebuttable presumptions do not apply if the actions of the business, the individual or the healthcare facility/provider showed gross negligence, willful and wanton misconduct, reckless infliction of harm or intentional infliction of harm.

It is difficult to reconcile the provision that creates immunity with the provisions that create a rebuttable presumption of assumption of the risk. Both the immunity and the rebuttable presumption are defeated by a showing of gross negligence, willful and wanton misconduct, reckless infliction of harm or intentional infliction of harm, and so both or neither will be avail-

able to a defendant. If the immunity is available, a rebuttable presumption is meaningless. Thus, the provisions that create a rebuttable presumption of assumption of the risk seem to be superfluous.

Importantly, the Act does not require the use of the prescribed warnings. They are required only if a healthcare facility/provider, another business or an individual wishes to take advantage of the rebuttable presumption of assumption of the risk. If a healthcare facility/provider, another business or an individual chooses not to use the prescribed warnings and thereby forfeit the rebuttable presumption of assumption of the risk, evidence of the decision not to use the prescribed warnings is not admissible in a lawsuit. Further, a defendant is entitled to immunity under the Act even if it does not use the prescribed warnings.

As shown by the exception for gross negligence, etc., the Act does not provide absolute immunity

from all liability relating to COVID-19. Depending on how lenient judges are in finding factual disputes as to gross negligence, willful and wanton misconduct, reckless infliction of harm or intentional infliction of harm, the immunity or the rebuttable presumption of assumption of the risk may not provide sufficient protection for healthcare facilities and providers, other businesses and individuals.

The Act should not be viewed as a limitation on what healthcare facilities and providers, other businesses and individuals can do to protect themselves from liability for money damages. Regardless of whether they use the prescribed warnings, they should follow all guidelines recommended by the CDC and their state and local governments. They should also consider guidelines issued by regulatory agencies and trade organizations since those entities are

*Continued on page 60*





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# Georgia Courts Continue to Highlight the Need to Prove Reasonableness and Necessity of Medical Bills

By Zach M. Matthews  
*McMickle Kurey & Branch, Alpharetta*

Over the past seven years, Georgia's state and federal courts have enacted something of a sea change in how defense practitioners secure and use evidence of lien-holding physicians' bias, intent and motive, not to mention how juries are expected to evaluate the reasonableness and necessity of the lien doctors' bills. With rising involvement of the litigation funding industry, Georgia litigants have seen medical damages presentations inflating—sometimes to shocking excess. It is now not out of the realm of possibility to see medical expense claims of \$600,000 or even \$900,000 arising out of an ordinary neck and back car wreck case. These inflated damages claims tend to be suspiciously well-correlated with cases against defendants holding large insurance limits.

However, recent developments in the law give defendants and their insurers some hope that the Courts are willing to hold the line on ever-increasing verdict figures. In 2013, the 11th Circuit decided *Cooper v. Marten Transp., Ltd.*, 539 Fed. Appx. 963 (11th Cir. 2013), holding for the first time that lien doctors must perform a legitimate differential analysis before offering the all-important causation opinion, which is required in a federal court tort action. Three years later the Southern District expanded upon that ruling, in the specific context of a neck and back car wreck case, in *Rangel v. Anderson*, 202 F. Supp. 3d 1361 (S.D. Ga. 2016). By requiring lien doctors to perform a full-blown differential analysis in the most common type of injury case, the federal courts now force these physicians to inquire into the plaintiff's past medical history (so as to rule out any past causative events). As Judge Carnes of the



Northern District (now with the 11th Circuit) held in *Kondragunta v. Ace Doran Hauling & Rigging Co.*, 2013 WL 1189493 (N.D.Ga. Mar. 21, 2013), when a physician expands his or her file beyond those things actually observed by the doctor in treatment, those additional file materials automatically convert that doctor into a Rule 26(a)(2)(B) expert who must give a full-blown report (and also disclose the doctor's financial stake in the case). That opinion, though unpublished, has become seminal on this issue and has now been cited more than fifty times around the country.

The federal courts have also recently highlighted the importance of evidence of bias, intent and motive—especially where the testifying physician has a lien on the outcome of the suit. In *ML Healthcare Servs., LLC v. Publix Super Markets, Inc.*, 881 F.3d 1293 (11th Cir. 2018), the 11th Circuit recognized that a referral relationship by which a doctor stands to gain additional patients (but only if he or she testifies favorably for this one) can be an alternate means of demonstrating bias, intent and motive.

The Court also overturned longstanding assumptions that the collateral source rule would bar much of this line of inquiry, holding that even legitimate collateral source evidence can be admissible if the evidence is more probative (to bias) than it is prejudicial. Georgia state courts have followed suit.

Shortly after *ML Healthcare* was published in 2018, the Court of Appeals handed down *Stephens v. Castano-Castano*, 346 Ga. App. 284 (2018), reversing a \$700,000 verdict in a lien doctor case because the trial court had refused to let in evidence of the lien doctor's financial bias in favor of the plaintiff (not to mention in favor of the doctor's own recovery). Increasing numbers of trial courts have issued their own unpublished opinions further substantiating the legitimacy of this evidence—and discovery efforts to obtain it. Most notably, the Northern District ruled in *Shure v. GS Rockledge*, 1:2016cv00650 (N.D.Ga. 2016) that the same lien doctor involved in the *Stephens* case was obligated to produce all of his correspondence with the plaintiff's counsel, all his marketing materials sent to plaintiff's lawyers for three years, and all evidence contained in his electronic medical records suite, while also reimbursing those defendants for their costs in securing the order.

Just this spring, the 11th Circuit punctuated its string of rulings with *Salkic v. Heartland Express, Inc.*, 2020 WL 2392196 (11th Cir. May 12, 2020), in which it held that evidence a lien-holding doctor performed 90% of his laser-spine surgeries on patients who had lawsuits was itself evidence of bias, intent and motive from which the jury could infer that the doctor's treatment was neither reasonable nor necessary.

*Continued on page 57*

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# Georgia Supreme Court Addresses Standard of Proof in Data Breach Cases

By Charles G. Hoey  
*Drew Eckl & Farnham, Atlanta*

In the case of *Collins et al v. Athens Orthopedic Clinic, PA*, 837 S.E.2d 310 (2019), the Georgia Supreme Court addressed the following question:

When a criminal steals consumers’ sensitive personal data, what do those consumers have to plead against the allegedly negligent business from whom the data was stolen to show a legally cognizable injury under Georgia tort law?

This case provides a roadmap for what must be proven in data breach cases for a plaintiff to win. The opinion explicitly left some questions unanswered regarding what a defendant’s duty is, how to prove a breach of the duty and how to prove causation. The Court encouraged the Georgia legislature to provide guidance regarding data breach cases.

The *Collins* case arose out of a class action lawsuit filed by multiple plaintiffs against Athens Orthopedic Clinic. In addition to seeking a class certification, the suit alleged that in June 2016, a hacker stole the personally identifiable information of at least 200,000 current and former patients of Athens Orthopedic Clinic. This information included addresses, birthdates, health insurance details and social security numbers. The plaintiffs further alleged that the hacker demanded a ransom from Athens Orthopedic which Athens Orthopedic refused to pay. The hacker then allegedly offered this information on the “dark web” for sale and posted the information, temporarily, on a data storage website called Pastebin. Athens Orthopedics notified the plaintiffs of the data breach in August 2016.



The lead plaintiff was Christine Collins. She alleged that fraudulent credit card charges were made not long after the data breach on one of her credit cards. All the named plaintiffs alleged that they had to spend time and money calling credit reporting agencies, placing a fraud alert with the agencies, monitoring their credit for fraudulent charges and taking other reasonable steps to avoid being victims of identity theft. All the plaintiffs alleged an “imminent and substantial” risk of harm and injury given that their personal information was for sale on the dark web.

The trial court granted the motion to dismiss filed by Athens Orthopedic Clinic on the grounds that the plaintiffs failed to state a claim which, even if fully proven, would constitute a legally cognizable injury. Athens Orthopedic Clinic argued, and the trial court agreed, that these plaintiffs could only show the possibility of harm sometime in the future as opposed to any actual and existing damages from defendant’s alleged breach of duty. A divided Court of Appeals affirmed the trial’s court dismissal based upon that same reasoning. The Georgia Supreme Court reversed the Court of Appeals and

explicitly held that the plaintiffs alleged a “cognizable injury.” The Supreme Court emphasized that the plaintiffs had only *alleged* a cognizable injury. As in any other tort case, the plaintiffs would have to provide hard evidence in support of their case to survive summary judgment.

After noting the absence of specific statutory guidance on data breach cases, the Georgia Supreme Court turned to basic negligence law. To prove a negligent data breach or release of private information, a plaintiff must show that a duty existed, that the defendant breached that duty, that the breach caused damages to the plaintiff and a showing of actual and existing damage. The Court held that a showing of “imminent and substantial” harm to the plaintiffs is sufficient. The possibility of, or even the increased likelihood of some damage or injury in the future, without more, is still insufficient.

The Court of Appeals’ opinion relied primarily on two cases which held that an inadvertent disclosure of private data, by itself, is not sufficient grounds to assert a negligence claim. The Georgia Supreme Court noted two important distinctions between

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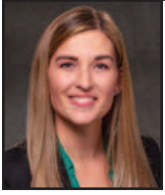
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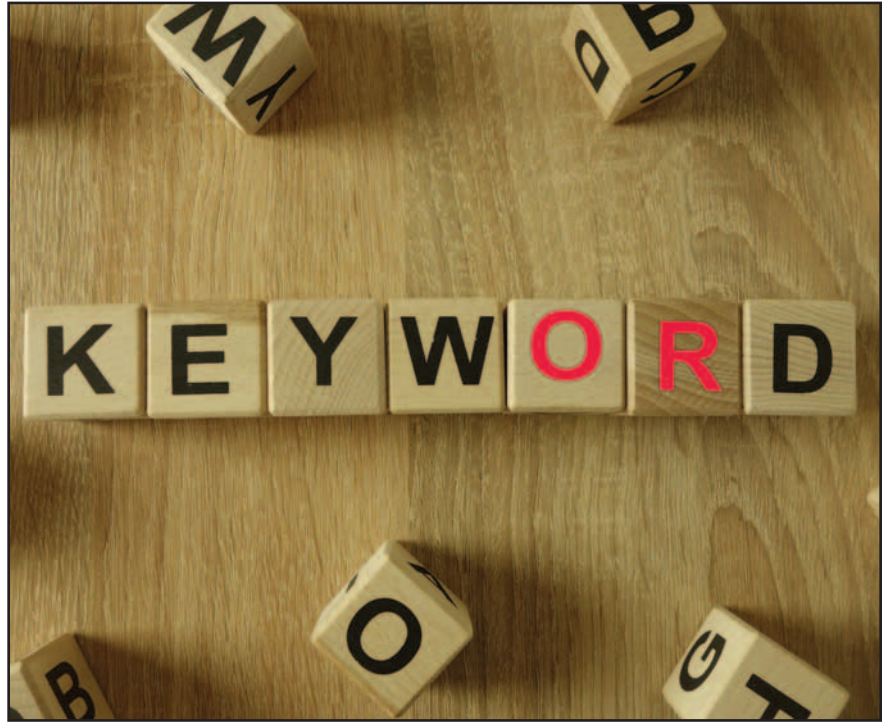
## A Proper Case for Opening Default: When “Or” Should Have Mattered

By Amy Buzby Knight  
*Mabry & McClelland, Atlanta*

The Supreme Court of Georgia recently overturned numerous cases in determining no reasonable explanation for failure to file a timely Answer is needed to open default in the context of a proper case. The Civil Practice Act allows default to be opened within 15 days as a matter of right. The default judgement statute provides three other situations in which default can be opened prior to the entry of final judgement: in matters of providential cause; excusable neglect; or, when determining all the facts, a proper case has been made for opening the default. O.C.G.A. § 9-11-55 (b).

Proper case is the broadest ground for opening default and permits “the reaching out in every conceivable case where injustice might result if the default were not opened,” *Axelroad v. Preston*, 232 Ga. 836, 837 (1974). Despite the use of the conjunction “or” in the default judgment statute, courts have historically held that a proper case is only met when a reasonable excuse is provided.

In *BellSouth Telecomms., Inc. v. Future Comms., Inc.*, 293 Ga. App. 247, 250 (2008), the Court of Appeals, while recognizing the expansive scope of the proper case ground, held that a default may be opened under that ground “only where a reasonable explanation for the failure to timely answer exists.” In reaching this conclusion, the *BellSouth* court relied on a line of cases seemingly derived from a misreading of *Brucker v. O’Connor*, 115 Ga. 95 (1902), where the Supreme Court said “a judge [has] no authority to open a default ... for reasons which fall short of a reasonable excuse for the negligent failure to answer.” *Brucker*, 115 Ga. at 96.



In the case of *Bowen v. Savoy*, 2020 WL 966997 (Ga., 2020), an executor of an estate sued her sisters in 2016 alleging collusion in appropriating their mother’s estate for their own use. The defendant-sisters filed a motion to dismiss for lack of personal jurisdiction but failed to file an answer and the case automatically entered default. Over six months later, the court denied the motion to dismiss and the defendant-sisters filed an untimely answer. The plaintiff moved for entry of default and the defendant-sisters moved to have the default set aside the next day. Defense counsel accepted responsibility for failure to timely answer based on a misunderstanding of the Civil Practice Act.

Defense counsel testified by affidavit to an incorrect belief that filing a motion to dismiss based on jurisdiction could substitute for an answer and delayed filing a responsive pleading until the trial court

ruled on the motion to dismiss. The trial court declined to set the default aside and entered a default judgment. The trial court’s order held that the defendants failed to provide a reasonable explanation for the failure to file a timely answer and determined it was not a proper case to open default. The Court of Appeals affirmed.

The Georgia Supreme Court granted certiorari in this case to address the following question: To show a proper case for opening default under O.C.G.A. 9-11-55 (b), must the defendant provide a reasonable explanation for the failure to file a timely answer? The Court answered that question in the negative, reversed the judgment of the Court of Appeals and remanded for further proceedings.

Because statutes are interpreted by their plain ordinary meaning, viewed in the context of which it appears and read in its most natu-

*Continued on page 63*



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## Whistling *Ipsa Dixit*

*Doctors' expertise in medicine does not mean they are experts in billing; even if they say it does*

By Connor Beer, AccuMed

When it comes to medicine, specialist physicians are at the peak of their field; they have spent their careers acquiring vast experience through fellowship and clinical practice. In fact, they are so skilled in medicine we often assume they must understand the finance and economics of the medical industry as well. But future neurosurgeons are not in medical school learning the correct coding of a spine fusion. Some providers use this misconception to their benefit; inflating their fees using shoddy billing tactics and leaning on their medical background for authority. For years, providers have been whistling *ipse dixit*; “because I said so.”

At the same time, defense attorneys are left at a disadvantage when it comes to reviewing a claimant’s medical records and bills to assess their client’s exposure. It can be difficult to spot fraudulent billing practices like upcoding, unbundling and duplicate billing. Furthermore, how do these fees compare to other providers in the area?

Many of these issues can easily be spotted by you, you just need to know what to look for. The goal of this article is to provide you with the knowledge and tools to spot tactics like upcoding, duplicate billing, inflated billing and unbundling.

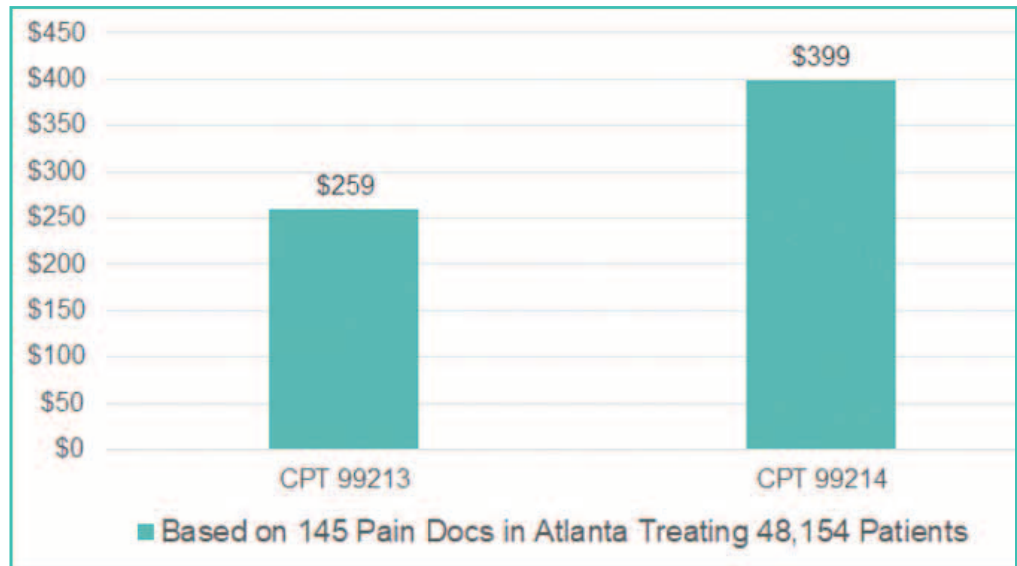
### Common Methods Providers Use to Inflate Medical Bills

To start, the cornerstone of assessing billed charges are the

records and bills. It is no secret that obtaining them can be a long and difficult process, but it is imperative to stay vigilant in obtaining the correct billing documents. Billing ledgers provide some information, but ultimately, the claims forms will provide the most detail on how the medical services were coded and billed. Many attorneys seek the claims forms as a matter of habit so they have the most reliable information possible. Following are the four most common methods providers use to inflate medical bills:

of detail of the exam. There is not a sizable difference between the two codes but with regular follow-up appointments over an extended period of time, this can add up to a substantial amount.

Upcoding can occur from evaluations to surgeries and identifying the issue requires review of the bills and records. The best way to spot an incidence of upcoding is to pay attention to evaluations, this is where it happens most. For example, codes 97161 and 97163 are both physical therapy evaluations of different complexity. 97161 is



### 1. Upcoding

The term “upcoding” is a fraudulent billing practice that continues to occur despite efforts to curtail it. Rather than billing the correct code for a procedure, the provider bills a similar code that is associated with a higher charge. The chart above shows the price of two office visit codes. The difference between the two codes is the length of time involved, the complexity of the medical decision making and the level

only 20 minutes where 97163 requires meeting with the patient for 45 minutes. A quick glance at the records will tell you how long the appointment really lasted. If it was only 20 minutes and they billed 97163, this is upcoding. Not sure if your hunch is correct? You are welcome to give us a call and bounce it off us. Identifying incidences of upcoding can be tricky, but when a pattern is formed, this can quickly discredit a provider’s credibility.

*Continued on page 64*



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# Fact or Fiction: Can You Trust Your Fire Investigator's Report?

By Jack Kennedy (left) and Stuart Morrison  
J.S. Held



## Overview

What separates a reliable fire cause determination from just another speculative opinion? An objective report rooted in scientific facts. In this report, we will examine key considerations that must be top of mind when developing or reviewing investigative reports following a fire.

## NFPA 921—The Foundation of Fire Cause Determinations

The National Fire Protection Association's "NFPA 921—Guide to Fire and Explosion Investigations" is acknowledged by the industry as a reliable, science-based guideline. First published in 1992, the NFPA 921 guideline established a methodology of fire investigation based on accepted scientific methods. Although it has undergone numerous iterations since then, the core message is the same: fire behavior, fire dynamics and thermodynamics are sciences that define fire ignition, growth and spread.

Here we will highlight many of the critical aspects of NFPA 921 and how and why they affect the eventual cause determination made by the investigator and their admissibility at trial.

### 1. The Scientific Method

The scientific method provides the building blocks for developing and proving a scientifically supported theory. Regarding fires, application of the scientific method requires a causation hypothesis to either be supported or disproved through actual data (e.g., fire patterns, witness statements, historical data, material properties, etc.). After available data is obtained, a theory as to the ignition and spread of the fire is developed. A defensible theory should include:



- A competent ignition source
- A first fuel ignited
- The events that brought them together
- The manner in which that fire spread

All theories must be tested in order to comply with the scientific method. There are different types of testing that can be conducted, including physical testing of similar conditions, analytical testing using accepted scientific principles or by referring to research conducted by others (Reference 1). Failure to adequately test the theory is a leading cause of inadmissibility at trial.

When a theory is tested and the hypothesis of the fire cause is found to match the available data, using accepted scientific principles, then it can be accepted and will be admissible as expert testimony. If the hypothesis does not match the available data, the theory should be discarded and a new theory developed. This cycle continues until a scientifically supported cause is identified or the fire is classified as undetermined.

### 2. Objectivity

Data related to the cause of the fire must be obtained without prejudice or judgement. NFPA 921 identifies two forms of bias that can impact the conclusions and admissibility of a fire investigation—they are expectation bias and confirmation bias.

*Expectation bias* occurs when the investigator forms an opinion *prior* to gathering all available data. Expectation bias has been shown to impact the performance of the total investigation. Those operating under an expectation bias will often tailor the investigation to identify evidence that supports their pre-determined cause theory. Expectation bias is often fatal to the investigation as some data may not be able to be recovered later, either by the time of a lab exam or at trial. The missing data also prevents adequate testing of a hypothesis, which violates the investigation methods outlined in NFPA 921.

*Confirmation bias* occurs *during* the testing stage of the scientific method. This type of bias occurs when the investigator fails to use all

*Continued on page 66*



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# Tips for Mediation: What Really Makes a Difference

By Sarah B. "Sally" Akins

*Miles Mediation & Arbitration, Savannah & Atlanta*

When mediation first became popular a couple of decades ago, many trial lawyers did not immediately buy into the concept. Trial lawyers had spent a lot of time and money to attend law school to learn how to try cases to a jury. While it is exciting to try cases to a jury, most trial lawyers would now agree that for most cases, mediation is much better way to get matters resolved, for several reasons.

These days it takes a long time to get a court date for a jury trial and many times after a verdict is rendered by the jury, an appeal ensues. Complete resolution through the courts can take years. Mediation, on the other hand, can resolve a matter in a few hours, thus bringing resolution to the parties much more quickly.

Trying cases to a jury is usually costly. Expert witnesses are many times employed to assist the jury understand some of the issues, multimedia presentations, jury consultants, attorneys' fees and other expenses make a jury trial a rather expensive proposition many times. The cost savings enjoyed resolving a case through mediation without incurring those expenses is beneficial to both the plaintiff and the defendant, as the net recovery to the plaintiff is increased and many times that saving can be passed on to the defendant, in the form of a slight discount on the settlement amount.

Of course, most importantly, is the certainty that mediation provides. All parties have control of the outcome, as opposed to putting a decision in the hands of twelve people unknown to the parties. Following are some observations about what seems most effective and what works at mediation.

## **Communicate with the Mediator Before the Mediation**

It is important to let the mediator know ahead of time about issues that



might require extra attention or be an impediment to settlement. Sometimes a party might need help managing client expectations. If the mediator knows this in advance of the mediation, an effective mediator can immediately begin helping the party see the case in a more realistic way.

If there are logistical concerns (e.g. numerous parties with differing interests), providing the mediator with some advanced notice of these will make for a more productive mediation. That way, these issues can be given thought and consideration in advance of the mediation.

Likewise, if there are thorny or unusual legal issues, provide the mediator with the law on these issues prior to the mediation, so that advanced consideration can be given to those matters.

## **Be Respectful**

The most effective advocates at mediation are those who are respectful and courteous to the opposing parties. Mediating is a different skill than trying a case. While the lawyer is always advocating for his client, at mediation, the goal is to resolve the case on terms favorable to your client. Many times, that means convincing the opposing party to do

something they do not want to do. (Pay more/accept less money to resolve a claim, apologize for something, etc.). Getting the opposing party to do that is generally easier when the lawyers are non-confrontational. This extends from the opening caucus and throughout the negotiations.

## **Bring it With You**

If you have a picture, a medical record or some other physical evidence that helps your case, bring it with you to the mediation. It is much more effective when the party is shown the actual thing/document. For example, showing the plaintiff a medical record from a doctor visit before the incident at issue during which she made the same complaints of pain is much more effective than simply stating plaintiff has pre-existing problems. The plaintiff seeing the actual black and white document can be very impactful.

I recently mediated a case in which there was a claim that the plaintiff had been hit with a certain type of paddle. Plaintiff's counsel had an exemplar paddle made and brought it to the mediation. That was a powerful tool. The defense (and the

*Continued on page 68*



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# Human Fatigue Risk Management in Workplace Settings: Implications for Litigation

By Chason J. Coelho, Sunil D. Lakhiani and Delmar R. "Trey" Morrison III  
Exponent



## Introduction

Human fatigue is a peculiar issue for workplace safety and risk management. Scientific and industry literature has linked fatigue to adverse health and performance effects, but organizations, individuals and regulators



alike have struggled to manage fatigue risks. Here we describe several challenges of fatigue risk management and review a new approach being adopted: the fatigue risk management system (FRMS). We also point out that as the FRMS sees more widespread adoption, companies are starting to face a new fatigue-related challenge—legal liability related to fatigue management.

A brief review of fatigue is given below. An example of a high-profile industrial incident involving fatigue follows, with relevant statistics, some specific challenges of fatigue management, historical context and implications for litigation noted thereafter.

## Human Fatigue

Fatigue is a state of reduced mental or physical performance capability that results from sleep loss, circadian challenge, difficult task factors or a combination thereof [1, 2]. Figure 1 illustrates that mental and physical fatigue serve as a link between fatigue hazards (e.g., long commutes, shiftwork, etc.) and accidents.

A high-profile incident involving fatigue entailed an explosion and subsequent fire at the BP Texas City Refinery in 2005; 15 people perished and 180 were injured [3].

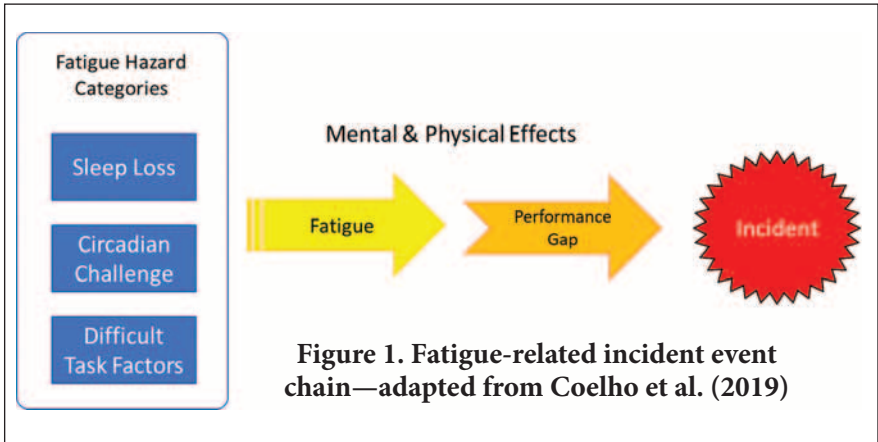


Figure 1. Fatigue-related incident event chain—adapted from Coelho et al. (2019)

An investigation by the U.S. Chemical Safety and Hazard Investigation Board found that the board operator had worked 12-hour shifts for at least 29 consecutive days, and the report suggested that fatigue-related human error contributed to the incident [3]. The company had neither a corporate nor a site-specific fatigue-prevention policy at that time, and its contract with the labor union specified a minimum number of work hours each week but not a maximum [3]. This incident directly led to significant fines, settlements, business interruption and corporate governance changes for BP. Fatigue played a part.

Research has statistically linked workplace fatigue and workplace fatalities and injuries. For example, one study reported that of the approximate 360,000 fatalities and 960,000 injuries that occur in workplaces worldwide each year, about 13 percent can be attributed to fatigue in some way [4]. It also appears that almost one quarter of the U.S. adult population experiences significant sleep problems [4]. Reduced sleep and longer work hours are associated with greater injury risk [5] and nighttime workers are almost three times more likely to be injured than daytime

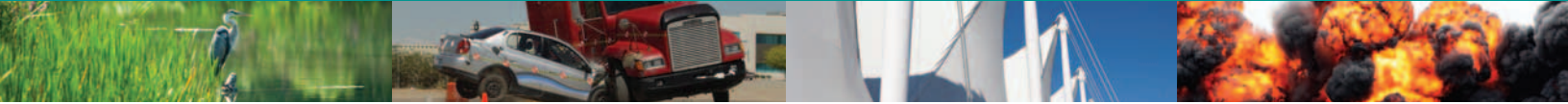
workers [6]. Jobs that require overtime are also associated with a 61 percent higher injury rate compared to jobs without overtime [7].

Other research suggests that these statistics are linked to poor human performance. A meta-analysis showed that fatigue can make people perform worse than 90 percent of rested people on various tasks [8]. Fatigue-related performance impairments can include slower reaction-time, divided-attention and poor memory recall, which are similar to the performance deficits resulting from alcohol intoxication [9]. Fatigue can also impair judgment, planning, learning and situation awareness [10]. It is perhaps unsurprising, then, that industrial organizations are becoming more and more interested in developing programs for managing fatigue.

## Managing Fatigue

Managing fatigue has proven challenging for several reasons. Fatigue is quite common [11] and individuals can struggle to accurately assess their own fatigue levels [12]. There are many potential work-based fatigue hazards, including, but certainly not limited to:

*Continued on page 69*



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## MASS TORTS CASE LAW UPDATE

By Todd E. Schwartz Substantive Law Section Chair  
*Lewis Brisbois Bisgaard & Smith, Atlanta*

***Davis v. John Crane, Inc. and FMC Corporation***  
**Court of Appeals of Georgia**  
**A19A1137 and A19A1138**  
**October 29, 2019**

In this consolidated appeal, Appellant Leisa Davis appealed the trial court's orders granting summary judgment to Defendants John Crane, Inc. and FMC Corporation. Appellant's husband, John Davis, worked at the Louisiana Pacific fiberboard mill in Alabama from 1984 to 1998. He spent a year working as a laborer before becoming a boiler operator. Appellant alleged that her husband's work exposed him to John Crane gaskets and packing as well as Peerless pumps from his work on boilers, pumps and valves. He developed mesothelioma in 2015 and died later that year. Both John Crane and FMC filed motions for summary judgment arguing that Appellant failed to establish proximate causation related to exposure of their respective products. The trial court granted both motions.

As to John Crane, the Court of Appeals reversed the grant of summary judgment finding that the deposition testimony of Appellant's husband was sufficient to satisfy the threshold burden of exposure as set forth in *Adamson v General Electric Company*, 303 Ga. App. 741 (2010). The Court of Appeals found, based on certain portions of Mr. Davis's testimony, that Mr. Davis had personal knowledge of his use of and exposure to John Crane asbestos-containing products.

FMC Corporation is successor-in-interest to Peerless Pumps. Appellant asserted the trial court erred in granting summary judgment to FMC on Appellant's negligent design and failure to warn claims, arguing that it was foreseeable that the pumps would require asbestos-



containing replacement parts and such foreseeability was sufficient to impose liability on FMC. The Court of Appeals rejected these arguments and affirmed summary judgment in favor of FMC. The Court found that Appellant's husband was not exposed to the original packing and gaskets in the Peerless pumps at the plant which were installed years before he started working there. Further, it declined to extend liability based on work on replacement parts manufactured or supplied by others since pumps could operate with packing made from materials other than asbestos. Because Appellant could not show that her husband was injured from the conditions of the Peerless pumps at the time they were sold, Appellant failed to establish her threshold burden of causation. The Court of Appeals rejected Appellant's attempt to impose liability in contradiction of the bare metal defense. Further, the Court of Appeals rejected Appellant's attempt to impose a duty to warn on FMC for other manufacturers' products used in the Peerless pumps as contrary to Georgia law.

Ms. Davis filed a petition for certiorari to the Supreme Court of Georgia on December 5, 2019. The

Supreme Court denied the petition on July 15, 2020.

***Long v. Daimler Trucks North America, LLC***  
**Court of Appeals of Georgia**  
**A20A1442**

This is a case pending in the Court of Appeals. Appellate briefs have been filed; oral arguments took place on June 2, 2020. The Court has not yet issued an opinion.

This is an asbestos personal injury case from the Superior Court of Catoosa County. The plaintiff, Ronnie Long, contracted lung cancer and ultimately died. Before his death, Long filed a lawsuit alleging that exposure from the defendants' products caused his lung cancer. In the trial court, Long filed a motion for summary judgment arguing that the defendants expert witnesses could not testify as to: (1) alternative carcinogens during Long's working career; or (2) whether Long's treating physicians committed malpractice by not treating him with a TK inhibitor drug.

The trial court found that the defendants failed to meet their burden of proof to show that Mr. Long's lung cancer was caused or

*Continued on page 73*



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## PREMISES LIABILITY CASE LAW UPDATE

By Patrick N. Silloway  
Balch & Bingham, Atlanta

**ASSUMPTION OF THE RISK**  
*Daly et al. v. Berryhill et al.*  
**Supreme Court of Georgia**  
**S19G0499**  
**June 1, 2020**

In *Daly v. Berryhill*, the Supreme Court of Georgia provided much-needed clarification concerning the role of objective reasonableness in the application of the assumption of the risk defense. In a unanimous opinion reversing the Georgia Court of Appeals, the Supreme Court reaffirmed there is an objective component to the knowledge prong of that defense and that “competent adults cannot blind themselves” to obvious risks. GDLA filed two amicus briefs as it the case made its way through the appellate process (see article on page 16).

The Supreme Court recounted the following facts. In October 2009, Shane Berryhill was suffering from chest pain and high blood pressure. After receiving a prescription for a blood-pressure medication at a local clinic, he received a referral to Dr. Dale Daly with Savannah Cardiology, PC. After performing a test, Dr. Daly prescribed medication to prevent blood clotting and an additional blood-pressure medication. On October 15, 2009, Dr. Daly performed two surgical procedures on Berryhill, one of which “reveal[ed] a 99 percent blocked artery.”

Post-surgery, Dr. Daly gave Berryhill and his wife instructions that Berryhill was to avoid strenuous activity for a week. He also informed them Berryhill “should be careful because he was on blood thinners.” Dr. Daly did not inform the Berryhills of the specific risk the medications could cause Berryhill to become dizzy or lose consciousness.



Berryhill left the hospital the day after the surgeries. Four days later—less than a week after having two surgical procedures performed on his heart—Berryhill decided to go hunting. Berryhill, carrying his rifle, hiked 200 yards to an 18-foot deer stand. After ascending the stand, Berryhill fainted, fell from the stand and suffered serious injuries to his back.

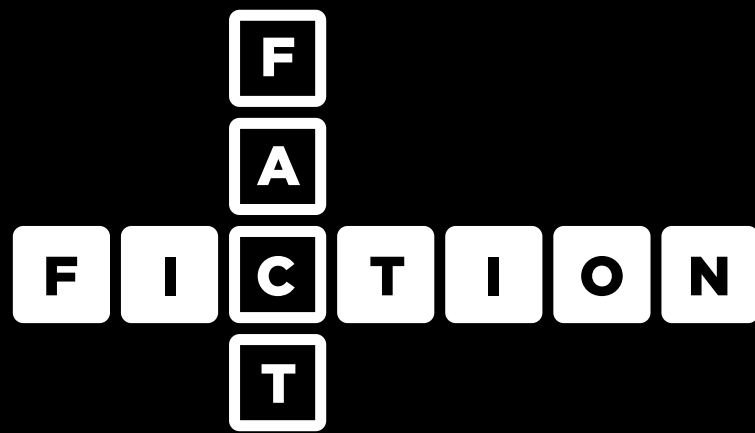
Berryhill and his wife sued Dr. Daly and Savannah Cardiology alleging Dr. Daly had overprescribed blood thinners. At trial, the court instructed the jury on the assumption of the risk defense, charging the jury it could not hold the defendants liable if Berryhill “knowingly and voluntarily [undertook] a risk of physical injury.” The jury returned a defense verdict.

The Berryhills appealed and the Court of Appeals reversed. That court concluded the generic warning not to engage in strenuous activity was not sufficient to put Berryhill on notice of the specific risk he could lose consciousness if he ignored the instruction.

The Supreme Court reversed. The Court acknowledged the assumption of the risk defense requires the plaintiff to have “both actual and subjective knowledge” of the risk he is alleged to have assumed. However, the Court held, “some risks are so clear that we impute knowledge of the risk to the plaintiff, so long as the plaintiff is competent.” In reaching its conclusion, the Court distinguished, though it did not go so far as to overrule, its decision in *Vaughn v. Pleasant*, 266 Ga. 862 (1996), in which the Court had held a police officer did not assume the risk of a collision despite driving over the speed limit in the wrong lane. The Court noted its opinion in *Landings Association, Inc. v. Williams*, 291 Ga. 397 (2012), in which it held a woman walking by a lagoon she knew could contain alligators assumed the obvious risk of an alligator attack, controlled instead.

Returning to the case before it, the Court held the trial court did not err by giving the jury an instruction on the assumption of the risk defense, as there was at least slight evidence Berryhill knew his conduct—hiking, carrying a rifle and climbing a deer stand five days after heart surgery—“posed a risk of serious physical injury.” That Dr. Daly did not specifically inform Berryhill of the specific risk of fainting and dizziness did not negate the fact that Berryhill, a competent adult, should have been aware of the risks posed by performing strenuous activity shortly after undergoing heart surgery and while on blood pressure medication.

This is an important and much-needed affirmation of the objective component of the assumption of the risk defense. A plaintiff cannot avoid the defense by pleading ignorance of an obvious risk. ♦



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## PROFESSIONAL LIABILITY CASE LAW UPDATE

By Meghan E. Pieler  
Balch & Bingham, Atlanta

### ADMISSIBILITY OF BIAS EVIDENCE

*Salkic v. Heartland Express, Inc.*  
No. 19-15068, 2020 WL 2392196  
(11th Cir. May 12, 2020)

On May 12, 2020 the Eleventh Circuit upheld the district court’s decision in *Salkic v. Heartland Express, Inc.*, admitting testimony from the plaintiff’s treating physician about the percentage of his laser-surgery patients who were involved in litigation. The district court also properly excluded the physician’s explanation that the percentage was so high because insurance did not cover the procedures.

Following a car accident, the plaintiff received treatment for back pain from Dr. Shahram Rezaiaimiri, incurring over \$213,000.00 in medical bills for various treatments including radiofrequency ablation and laser spine surgery. The plaintiff offered Dr. Rezaiaimiri’s testimony as a treating physician and as an expert witness. However, the court also allowed the defendant to present deposition testimony to the jury that over the last two years, 90 percent of Dr. Rezaiaimiri’s laser spine surgeries were for patients involved in personal injury litigation. The defendant successfully argued that this evidence “goes straight to [Dr. Rezaiaimiri’s] financial bias for how he treats his patients and how he treated [the plaintiff].”

The plaintiff then attempted to proffer what he deemed to be additional “context” testimony: Dr. Rezaiaimiri’s explanation for the high percentage of laser spine surgeries in personal injury litigation was because the procedure was not covered by insurance. The district court excluded this portion of his testimony. It was concerned this



***“... the high percentage of laser-surgery patients also involved in litigation, coupled with evidence Dr. Rezaiaimiri had a lien against the plaintiff, suggested he had a financial incentive to bill excessively or provide treatment that was not medically necessary.”***

would open the door on other issues related to insurance. The district court also found it was unclear whether the only explanation for the 90 percent number was that patients’ insurance would not cover the procedure.

The Eleventh Circuit affirmed the district court’s evidentiary decision. The court specifically found the “90 percent” testimony was relevant for two distinct reasons. First, it has a tendency to show that the medical expenses billed by Dr. Rezaiaimiri may not have been reasonable or necessary. As argued by the defendant, the high percentage of laser-surgery patients also involved in litigation, coupled with evidence Dr. Rezaiaimiri had a lien against the

plaintiff, suggested he had a financial incentive to bill excessively or provide treatment that was not medically necessary. Second, the testimony was relevant to show bias.

The jury could infer that Dr. Rezaiaimiri was incentivized to provide more favorable testimony to the plaintiff because he “stood to collect from successful personal-injury actions generally” and the plaintiff’s case specifically. The Eleventh Circuit also agreed that the district court did not abuse its discretion in excluding the context testimony. Importantly, this decision provides additional support for defendants seeking to introduce testimony of a treating physician’s financial bias in personal injury litigation. ♦



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## Incoming President

*Continued from page 5*

been asked by the Supreme Court of Georgia to offer legal argument on one occasion and as of this writing have at least six pending briefs before the Georgia appellate courts and several other being authored.

While we seek to shape the law via our amicus program, we have joined forces with our colleagues on the other side of the “v.” to do what we can to get us all back into the courtroom. Alongside the Georgia Trial Lawyers Association (GTLA), we have established Mask Up For Justice! This fundraising effort will go toward buying masks and other personal protective equipment for courthouses statewide to help them reopen safely in light of COVID-19. See the article on page 15 and please donate today individually and also ask your firms to contribute. Click the Mask Up For Justice! logo on our homepage to donate.

Another important ongoing effort is carried out by our Legislative Chair Jake Daly who keeps the membership informed while the General Assembly is in session. This was particularly true when the legislature re-convened after the

onset of the pandemic. Jake immediately identified several pieces of proposed legislation bearing directly on the civil defense bar. His final report is on page 34. Thank you, Jake.

Nearly 250 years ago, our Founding Fathers penned these words: “We hold these truths to be self-evident, that all men are created *equal*, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The words “equality” and “equity” come from the same Latin root, “*aequus*,” meaning equal—the very word used in the Declaration of Independence. Rightfully so, efforts to focus on diversity and inclusion are increasing in our society.

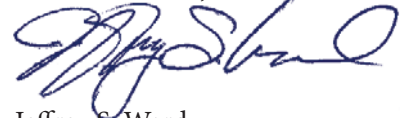
GDLA has a Diversity Committee led by Candis Smith, and we are making a concerted effort to be inclusive in our ranks. For example, we offer first year free memberships to qualifying lawyers who belong to a diverse bar like Gate City. Also, in the last two years, the GDLA Women Litigators Section burst onto the scene and has become one of the most active groups in our organization. Congratulations to my law partner (and

friend) Karen Karabinos and the other leaders of this section.

In all we do, personally and professionally, we should strive to include and encourage new members; young and old, diverse and non-diverse.

I hope (and intend) the theme running through this message is one of ambition and inclusion. Songwriter and singer extraordinaire Jimmy Buffett once said, “Some make the world go round; others watch it turn.” Mentor, encourage, include and engage. The GDLA Board of Directors and I are excited about where we are and where we are going. GDLA Past President and soon to be outgoing DRI Regional Director Ted Freeman recently shared the following, “If you are a civil defense lawyer in Georgia—consider the benefits—you really cannot afford *not* to be a member of the Georgia Defense Lawyers Association.” Encourage others to join us!

For the Defense,



Jeffrey S. Ward  
GDLA President 2020-2021  
*Drew Eckl & Farnham, Brunswick*

## Outgoing President

*Continued from page 5*

contributors to the GDLA *Law Journal* who worked to finalize it while working remotely.

GDLA has also been an integral part of the Statewide COVID-19 Task Force, working with other bar organizations and the judiciary to preserve and re-open the judicial system. I have had the privilege of serving on the Task Force and working to advance the common goal of ensuring Georgia’s court system continues to function. GDLA continues to be active in its outreach efforts, and it will con-

tinue to support the court system in ways that no one could have imagined just 12 short months ago.

The COVID -9 pandemic obviously curtailed some of GDLA’s events, including its Annual Meeting. Jeff Ward had an incredible program planned for the Annual Meeting at The Breakers in Palm Beach which unfortunately was cancelled. I share the universal hope that by the time of next year’s Annual Meeting we will be able to renew friendships in-person.

I leave the organization in the very capable hands of Jeff Ward and wish him the very best for the next year. GDLA has been blessed

with great leadership over the years and I know that Jeff and those who will follow him will continue to advance the interests of the defense bar. I have been fortunate to serve this organization and look forward to joining the ranks of its Past Presidents. Thank you again for the opportunity to serve GDLA.

For the Defense,



David N. Nelson  
GDLA President 2019-2020  
*Chambless Higdon Richardson  
Katz & Griggs, Macon*

## Medical Bills

*Continued from page 36*

The reasonableness and necessity of the plaintiff's bills is the most recent area of activity for Georgia's courts. Last year the 11th Circuit handed down *Showan v. Pressdee*, 922 F.3d 1211 (11th Cir. 2019), describing the reasonableness and necessity of the plaintiff's bills as a "critical inquiry under Georgia law." Then on June 29, 2020, the Georgia Supreme Court resolved a lengthy case line with its latest decision in *Bowden v. Medical Center* (not yet published). The new *Bowden* holding bears close study.

*Bowden* is a many-tentacled litigation which has been up on appeal several times. At issue are claims raised by a lawsuit plaintiff that the hospital in question defrauded the plaintiff by virtue of filing a medical lien on the plaintiff's recovery at its full "100% Chargemaster" rate. In the medical industry, the Chargemaster system is shorthand for the full price of services, sometimes also called the "self-pay" rate. For a typical hospital, these charges will be calculated by very sophisticated number-crunching, so as to turn a profit across a range of potential payors in what industry jargon terms a "payor mix". These payors range from well-heeled insurers like Blue Cross/Blue Shield or Kaiser, to federal or state medical assistance programs like Medicare/Medicaid or TriCare, on down to the walk-in or "self-pay" patient.

There is a joke in the medical industry that "self-pay means no-pay," but in the case of those uninsured patients who happen to have lawsuits, this is not necessarily the case. Indeed, a self-pay patient with a suit against a deep-pocketed defendant usually represents an opportunity for the hospital or provider to boost its profit margin. Some hospitals—generally large trauma centers—point to altruistic reasons for this system. They say that securing large payments from

"self-pay" lawsuit plaintiffs helps offset the costs of treating all the other self-pay patients who cannot pay at all.

Other medical providers have no such claims; indeed some Metro Atlanta physicians have constructed entire clinics around "self-pay" lawsuit patients, practicing medicine up to 75 percent of the time under this system.

The *Bowden* plaintiff raised charges of negligent and intentional misrepresentation as well as racketeering activities under the Georgia RICO Act, arguing that the hospital knew good and well that it never recovered its 100% Chargemaster rate, and therefore that the liens it asserted should have been for something more akin to reasonable and necessary value.

In a pair of companion cases called *Clouthier v. Med. Ctr. of Cent. Georgia, Inc.*, 351 Ga. App. 883 (2019) and *Aguila v. Kenestone Hosp., Inc.*, 353 Ga. App. 17 (2019), Georgia's Court of Appeals largely bought the same argument raised by the *Bowden* plaintiff. In both cases, the litigants raised similar claims of fraud and misrepresentation; the primary difference was that these two plaintiffs had actually secured the defendant hospitals' average recovery rates, which were a somewhat shocking-to-the-conscience 25 percent and 27 percent of the asserted Chargemaster rates. In other words, the hospitals' liens on the plaintiff's recovery were approximately four times what was arguably their reasonable and necessary (or at least market-average) value.

However, in the latest *Bowden* holding, the Supreme Court took a different view, overturning both *Clouthier* and *Aguila* in its June 29 opinion, and ruling that the hospitals in all three cases were entitled to summary judgment as to the full slate of fraud and RICO claims. This certainly has the appearance of a home run for the medical provider industry. However, the Court's holding may also have in-

jected a new argument into Georgia civil jurisprudence.

The Court reasoned that a hospital asserting a 100% Chargemaster rate of recovery could not commit misrepresentation, much less racketeering, because the 100% Chargemaster rate is nothing more than a "starting point" for evaluating the reasonableness and necessity of the plaintiff's bills. In so holding, the Court may have undermined the plaintiffs' lawyers' favorite billing argument; namely that no matter how inflated or unfair the medical bill may have been, ultimately "the plaintiff has to pay it because the doctor has a lien." If Georgia law is that the doctor's lien is nothing more than a "starting point" for negotiations, and if the doctor is only entitled, in the Supreme Court's words, to "collect on the lien for the amount that actually is reasonable" (their emphasis), then how is the plaintiff's medical bill upon which the lien is founded anything more than a starting point of its own?

Thanks to *Bowden*, Georgia defense lawyers should now be able to seek a jury instruction explaining that a medical provider is only entitled to be repaid that which is reasonable, regardless of whether or not the provider has a lien on the suit. In some respects this holding is ironic; while *Bowden* at first glance seems like an unqualified victory for the hospitals and lienholding physicians now so fully engaged in Georgia civil practice, the opinion may ultimately come back to haunt them by disarming plaintiff counsel of one of their best arguments for a recovery based on a multiple of the provider's inflated "100% Chargemaster" bill. ♦

*Zach Matthews is a partner with McMickle Kurey & Branch in Alpharetta and serves on the GDLA Board of Directors. His practice is mostly focused on high loss/catastrophic claims, including trucking, premises liability and negligent security.*



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## Proof in Data Breach Cases

*Continued from page 38*

those cases and *Collins*. First, the cases relied upon by the Court of Appeals were rulings on summary judgment after discovery was completed, where the plaintiffs had the opportunity to present evidence supporting their cases. In *Collins*, a motion to dismiss was granted on the grounds that the lawsuit, as pleaded, did not allege a legally cognizable claim. The Georgia Supreme Court left no doubt that the plaintiffs had, at least, alleged a legally recognized claim. The plaintiffs were, therefore, entitled to commence discovery and have the opportunity to prove their claims.

The second distinction is that in *Collins*, the plaintiffs alleged existing damages in addition to the potential future risk of harm. The personal data was allegedly stolen by a criminal and offered for sale on the dark web. The Supreme Court opinion noted that there is


no reason to purchase this kind of personal information other than to use it in an identify theft scheme. Ms. Collins had fraudulent credit card charges shortly after the breach occurred. Even if those charges were removed, the plaintiffs had still shown actual damages. The “imminent and substantial risk” created by a criminal offering personal information for sale constituted sufficient damages to allow the case to proceed. Additionally, the time and money expended to take all necessary steps to have the charges reversed, notify credit agencies and take the steps necessary to protect the plaintiffs’ credit constituted a legally cognizable injury. The opinion distinguished an inadvertent release of some personal information, which causes no actual harm to a plaintiff, from the theft and sale of private information by a criminal.

Many important questions are unresolved. The opinion does not

define the duty which a business such as Athens Orthopedic has to protect private and personal information. Although we know that there is a duty, the duty, and what constitutes a breach of that duty, are poorly defined. There is also no clear definition of how a plaintiff can prove causation of damages or exactly what the damages will be.

The Georgia Supreme Court explicitly asked the state legislature to provide statutory guidance on these issues. Since data breaches and allegations of negligent cybersecurity are a growing area of tort law, there is likely to be a significant amount of litigation regarding these unresolved issues during the next few years. ♦

*Charles G. “Chuck” Hoey is of counsel at Drew Eckl & Farnham in Atlanta and has litigated workers’ compensation, general liability, coverage, subrogation and other insurance claims for nearly 30 years.*



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## Legislative Review

*Continued from page 35*

more likely to have guidelines that are specifically tailored for their type of business. Complying with industry-specific guidelines should reduce liability exposure. Equally important is documenting compliance with guidelines.

The Act does not limit any other immunity that may be available under state or federal law and it does not modify or supersede other specified laws, including those in Title 16 (crimes), Title 31 (health) and related regulations, Chapter 9 of Title 34 (workers' compensation) and Chapter 3 of Title 38 (emergency management). Also, because the Act provides a defense to a claim but does not create a claim, the elements of the claim brought by a claimant are not affected by the Act.

For example, if a claimant sues a business under O.C.G.A. § 51-3-1 for contracting COVID-19 on its

premises, he or she still must prove that the owner or occupier of the business had superior knowledge of the allegedly dangerous condition on the premises. In light of the media coverage and overall societal awareness of COVID-19 and its risks, not many people would be able to claim credibly that they were not aware of the danger of becoming infected.

A claimant asserting a COVID-19 liability claim also must prove causation. Because COVID-19 has an incubation period of up to 14 days, and because it can be transmitted from person to person asymptotically, it will be very difficult for a claimant to prove where or from whom he or she was infected. Even if a claimant can identify a specific person who allegedly infected him or her, it will be difficult to prove that the person's violation of a particular guideline (e.g., not wearing a mask) caused the infection. After all, a person can be infected in the total

absence of negligence by another person. Thus, even if the immunity or the rebuttable presumption of assumption of the risk is not available, proving causation will be a high hurdle for claimants to overcome.

Finally, the Act applies only to COVID-19 liability claims that accrue on and before July 14, 2021. Hopefully, no COVID-19 liability claims will accrue after that date, but unless there is a vaccine for COVID-19 before the end of the 2021 session, the General Assembly may need to consider lengthening the applicability of the Act. An open question is whether the Act applies to COVID-19 liability claims that accrue prior to the effective date of August 5, 2020, so that could be a source of future litigation.

### House Resolution 1023: Waiver of Sovereign Immunity

During the last several years, the Georgia Supreme Court has



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held that the state, including its departments and agencies and its officers in their official capacities, is entitled to sovereign immunity from lawsuits seeking injunctive and declaratory relief, including lawsuits challenging the constitutionality of a law: *Lathrop v. Deal*, 301 Ga. 408 (2017); *Olvera v. Univ. Sys. of Ga.'s Bd. of Regents*, 298 Ga. 425 (2016); and *Ga. Dept of Natural Resources v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593 (2014).

Since 2015, the General Assembly has been attempting to legislatively overrule these decisions. In 2015, the House passed a bill that would have waived the state's sovereign immunity from claims for injunctive and declaratory relief. The Senate took no action on that bill in 2015 and so it carried over to 2016. Although the Senate and the House eventually passed a substitute bill, Governor Nathan Deal vetoed it. A similar bill was introduced in the House in 2018, but that bill died in committee.

The General Assembly tried again last year when it passed a bill that would have waived the sovereign immunity of the state, state governmental entities, and officers and employees of the state in their official capacity for claims seeking injunctive and declaratory relief, including claims challenging the constitutionality of a statute under either the federal or state constitution. That bill also would have waived the sovereign immunity of cities, counties, other political subdivision governmental entities, and their officers and employees in their official capacity for claims seeking injunctive and declaratory relief. Although that bill had overwhelming support in the General Assembly, Governor Kemp vetoed it because he wanted a more appropriately tailored bill.

Despite its failures in three of the last four years, the General Assembly did not give up this year. But instead of passing another bill, this year legislators unanimously adopted a resolution, HR 1023,

which will ask the voters in a referendum to decide whether the Georgia Constitution should be amended to waive the sovereign immunity of the state, counties and municipalities for lawsuits seeking declaratory relief for acts of government officials done outside the scope of their lawful authority or in violation of the constitution and laws of the state or the federal constitution. Apparently satisfied with letting the voters decide this issue, Governor Kemp signed HR 1023 and so the ballot for the general election in November will include the following question:

Shall the Constitution of Georgia be amended to waive sovereign immunity and allow the people of Georgia to petition the superior court for relief from governmental acts done outside the scope of lawful authority or which violate the laws of this state, the Constitution of Georgia, or the Constitution of the United States?

**Senate Bill 373:  
Business Judgment Rule**

In general, the business judgment rule recognizes that officers and directors are fallible and that they will make mistakes, but it protects them from liability for making bad decisions as long as their decisions are made honestly and with the exercise of appropriate diligence. It reflects a reluctance by judges to question the business judgment of businesspeople, who generally know how to manage their business affairs better than judges, especially since judges evaluate their decisions with the benefit of hindsight.

In 2017, the General Assembly enacted HB 192, which amended O.C.G.A. §§ 7-1-490, 14-2-830 and 14-2-842 by creating a presumption that officers and directors of banks and for-profit corporations acted in good faith during their decision-making process and that

they exercised ordinary care, provided that this presumption may be rebutted by “evidence that such process constitutes gross negligence by being a gross deviation of the standard of care of [an officer and/or a director] in a like position under similar circumstances.”

This created an inequity in how the business judgment rule applied to officers and directors of banks and for-profit corporations versus officers and directors of non-profit corporations, electric membership corporations and foreign electric cooperatives. The General Assembly corrected this discrepancy via SB 373 by amending O.C.G.A. §§ 14-3-830, 14-3-842, 46-3-303 and 46-3-303.1 to incorporate the rebuttable presumption from O.C.G.A. §§ 7-1-490, 14-2-830 and 14-2-842. Thus, the business judgment rule now applies equally to officers and directors of banks, for-profit corporations, non-profit corporations, electric membership corporations and foreign electric cooperatives.

**Senate Bill 451: Statute of  
Repose for Construction  
Defect Claims**

The statute of repose for claims alleging a construction defect is 8 years following substantial completion. O.C.G.A. § 9-3-51. On October 31, 2019, the Georgia Court of Appeals held that this statute applies to claims for breach of express contractual warranty, not just claims for negligence, because it “makes no distinction between claims sounding in negligence and those sounding in contract. Whether in tort or in contract, the statute broadly precludes any action to recover damages brought outside the eight-year period of repose.” *S. States Chem., Inc. v. Tampa Tank & Welding, Inc.*, 353 Ga. App. 286, 295 (2019). SB 451 overruled this decision by adding the following new subsection to O.C.G.A. § 9-3-51: “This Code section shall not apply to actions for breach of contract, including, but

## Legislative Review

*Continued from previous page*

not limited to, actions for breach of express contractual warranties.”

### House Bill 838: Cause of Action for Peace Officers Injured While Performing Official Duties

During the debate on the hate-crimes bill, some legislators wanted to include certain protections for police officers who are injured while performing their official duties. Ultimately, these protections were omitted from the hate-crimes bill and included in a separate bill, HB 838. This bill creates a new crime called “bias motivated intimidation,” which occurs when a person (1) kills or seriously injures a person maliciously and with the specific intent to intimidate, harass or terrorize that person because of his or her actual or perceived employment as a first responder (defined as a firefighter, a peace officer or an emergency medical technician); or (2) damages or destroys real or personal property of a person because of his or her actual or perceived employment as a first responder, but only if the value of the property exceeds \$500. O.C.G.A. § 35-8-7.4.

It also allows peace officers to bring a civil cause of action against any person, group of persons organization, corporation or the head of an organization or corporation for (1) causing bodily or pecuniary damages during the officer’s performance of official duties; (2) violating the officer’s civil rights during his or her performance of official duties; and (3) filing a complaint against the officer knowing it was false when filed. O.C.G.A. § 35-8-7.3.

### Senate Bill 405: Six-Person Juries

The bills and resolution discussed above are important because they passed the General Assembly and were signed by Governor Kemp. SB 405, however, is

noteworthy because it did not pass. This bill would have temporarily amended O.C.G.A. § 15-12-122 to allow civil jury trials with as few as six jurors, regardless of the amount at issue. In state court, this would have been permitted at the discretion of the trial judge or by consent of the parties. In superior court, this would have been permitted only upon the consent of the parties because the Georgia Constitution requires 12-person juries in courts of general jurisdiction.

This bill was an attempt to cure some of the backlog in civil trials that is expected to exist once they are permitted to proceed. But, regardless of how well-intentioned this bill may have been, GDLA opposed it for several reasons. First, juries consisting of fewer than 12 jurors are generally considered to be a disadvantage for defendants in tort cases because there are fewer people for the plaintiff to persuade. Second, GDLA’s research showed that there are scientific reasons for opposing six-person juries. Specifically, psychology research shows that 12-person juries are better for the judicial process because (1) they increase the chance of a dissenting juror having an ally, which means that those in the minority will be better able to resist group pressure; (2) they are more likely to include members of minority groups; (3) they are better able to accurately recall trial testimony; (4) they spend more time deliberating; and (5) they reach fewer erroneous decisions (because reliability is increased by having more people decide an issue). Finally, GDLA’s research showed that smaller juries save little, if any, court time and money.

Although the stated goal of SB 405’s proponents was commendable, it seemed that in everyone’s haste to do something before the end of the session, nobody considered whether smaller juries would actually accomplish this goal. As GDLA found when it researched this issue, smaller juries have a neg-

ligible impact in terms of saving time and money. And, any such savings that might have been realized would have been more than offset by the loss in fairness, accuracy and community participation that comes with 12-person juries. Thus, the defeat of this bill was a good outcome.

◆◆◆

Legislatively speaking, the 2020 Session has been a good year for GDLA and its members’ clients. In the political realm, avoiding detrimental legislation is often just as important as enacting advantageous legislation. While the much-anticipated tort reform measures proposed by the Senate Reducing Georgia’s Cost of Doing Business Study Committee were not enacted, they should remain under consideration in the future. Despite these significant tort reform measures falling victim to COVID-19, the General Assembly enacted several new laws this year that will have a favorable impact on clients of GDLA’s members.

At the same time, was able to avoid bills that would have had a negative impact on its members’ clients, such as the bill that would have decreased the number of jurors in civil trials to six. There is much to look forward to on the legislative front for next year, so stay tuned for updates via this magazine or e-mail as the 2021 session approaches.

In the meantime, if you have any questions about what GDLA is doing for its members and their clients with respect to legislation, email me at [jdaly@fmglaw.com](mailto:jdaly@fmglaw.com). ◆

*Jacob E. “Jake” Daly chairs GDLA’s Legislative Committee and was honored this year with the President’s Award for his extraordinary efforts in tracking bills of interest to the civil defense bar, as well as testifying and otherwise providing background as needed by legislators. He is of counsel with Freeman Mathis & Gary in Atlanta.*

## When “Or” Should Have Mattered

*Continued from page 40*

ral and reasonable way, the Supreme Court found the use of the word “or” a clear indicator that the statute establishes three distinct grounds upon which default may be opened. The Supreme Court held that a reasonable excuse is only necessary in the context of excusable neglect and would convolute the plain language of the statute if required elsewhere. While each case for opening default is uniquely fact specific, all hope is not lost if you have a good case for opening in the interests of justice but a terrible excuse for why you failed to answer.

This holding overturned *Bell-South Telecomms., Inc. v. Future Comms., Inc.*, 293 Ga. App. 247, 666 S.E.2d 699 (2008); *Hernandez v. Schumacher Group Healthcare Consulting, Inc.*, 352 Ga. App. 838,

835 S.E.2d 787 (2019); *Summerville v. Innovative Images, LLC*, 349 Ga. App. 592, 826 S.E.2d 391 (2019), *Samadi v. Fed. Home Loan Mtg. Corp.*, 344 Ga. App. 111 (1) (b), 809 S.E.2d 69 (2017); *In re Estate of*

“  
*The Georgia Supreme Court held that a reasonable excuse is only necessary in the context of excusable neglect and would convolute the plain language of the statute if required elsewhere.*  
 ”

*Loyd*, 328 Ga. App. 287, 761 S.E.2d 833 (2014); *Sierra-Corral Homes, LLC v. Pourreza*, 308 Ga. App. 543, 708 S.E.2d 17 (2011); *Herring v. Harvey*, 300 Ga. App. 560, 685

S.E.2d 460 (2009), *NorthPoint Group Holdings, LLC v. Morris*, 300 Ga. App. 491 (1), 685 S.E.2d 436 (2009); *Vibrattech, Inc. v. Frost*, 291 Ga. App. 133 (2), 661 S.E.2d 185 (2008); *Sidwell v. Sidwell*, 237 Ga. App. 716 (1), 515 S.E.2d 634 (1999); *Tauber v. Community Centers Two, LLC*, 235 Ga. App. 705 (3), 509 S.E.2d 662 (1998); *First Union Nat. Bank of Ga. v. Floyd*, 198 Ga. App. 99 (2), 400 S.E.2d 393 (1990); and *Early Co., Inc. v. Bristol Steel & Iron Works, Inc.*, 131 Ga. App. 775, 206 S.E.2d 612 (1974). ♦

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FIGURE 1

The figure displays two identical copies of a medical billing form (NUCC Form 1500) side-by-side. The top form shows four rows of service dates (10/09/19 to 10/09/19) with identical charges and NPI numbers. The bottom form shows the same data but with 'AS' (Assistant Surgeon) added as a modifier to the procedure codes. A callout box points to the 'AS' modifier with the text 'AS = Assistant Surgeon'. Another callout box points to the identical rows with the text 'Same Doctor!'.

1	24. A. DATES OF SERVICE	B. PLACE OF SERVICE	C. PROCEDURE, SERVICE, OR SUPPLY	E. DIAGNOSIS	F. CHARGES	G. DAYS OF UNITS	H. UNIT	I. RENDERING PROVIDER ID.#
1	10 09 19 10 09 19		22551		8413 00	1		XXXXXXXXXX
2	10 09 19 10 09 19		22845 59		6635 00	1		XXXXXXXXXX
3	10 09 19 10 09 19		22853		1650 00	1		XXXXXXXXXX
4	10 09 19 10 09 19		20930		680 00	1		XXXXXXXXXX

## Whistling Ipse Dixit

Continued from page 22

### 2. Duplicate Billing

Duplicate billing is another way physicians can boost fees. For example, if a surgeon performs a procedure without a surgical assistant, they are not allowed to bill for their own services as well as those of a surgical assistant's (see Figure 1 above).

These practices can be seen on a billing ledger, but it is always best to obtain the claims forms to confirm. In the bill above, duplicate billing was apparent because the date of service, codes, charges, units and rendering provider NPI number were all identical. However, the modifier "AS" represents a surgical assistant; the surgeon billed for their services and the surgical assistant's services.

Another form of duplicate billing is when providers charge for services that were never performed. Upon review of a billing ledger for a pain management specialist, it is common to see multiple dates of service for injections. If you do not have any additional billing information, such as the claims forms, you will consider the total billed amount on the ledger the total billed charges for that provider. But what if you also have the claims forms and after reviewing the claims forms, you notice there is not a claim form for a date of service with \$5,000 in charges? The charges can only be accounted for on the ledger. As you continue reviewing you find four additional dates of service that do not have accompanying claims forms, but the provider included all those charges on the ledger. After looking at the records, there is no indication

treatment was completed on the dates of service in question. Without the proper billing documents, you might have overlooked \$25,000 in billed charges that were never completed.

### 3. Inflated Charges

Physicians who operate in the PI space have been known to charge claimants higher rates, in hopes that they would lead to larger settlements. In doing so, the providers are then willing to take reductions and accept a more reasonable amount after settlement. In order to show the charges are unreasonable, you need to collect data from local providers and facilities. We are all aware this can be cumbersome and extremely difficult to accomplish.

Many attorneys keep a cheat sheet of common codes and their typical prices in their area as a

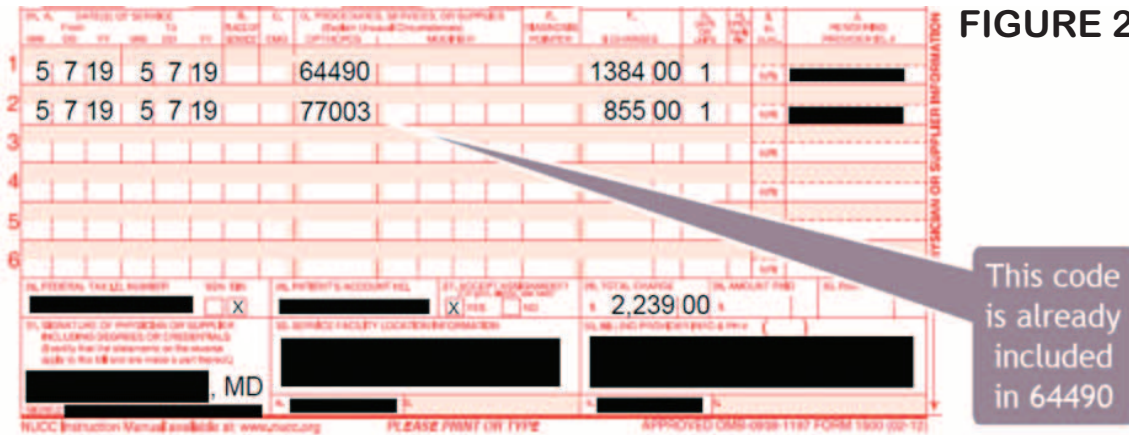
point of reference. AccuMed has put together its own cheat sheet for various locations around the nation and provides those at no cost, so just ask for a complimentary version in your geographic area of need.

Figure 2 below is from an AccuMed report that analyzes billed charges based on charged amounts from local providers and facilities. All our data has been painstakingly geolocated so we can focus in on providers right down to a specific location. Our database has 3.1 billion patient encounters from 1.3 million

extracted from a claims form that lists two codes: 64490 and 77003. Code 64490 represents a one-level cervical or thoracic injection with image guidance (fluoroscopy or CT). Code 77003 is for fluoroscopic guidance. Even though 64490 includes the guidance component, 77003 was still billed to the patient. In this case, the billed charges were increased by 60 percent. The repetition of this billing practice can have significant implications on the provider's overall total billed charges.

**Conclusion**

Remember, it is best to turn to an expert when your gut tells you something seems awry. With billions of records to use for comparisons, a medical billing expert can give you concrete data to refute alleged charges. When



**FIGURE 2**

providers. This information gives us the ability to show transparency into the cost of healthcare.

The practice of inflating charges is happening across the nation but has recently become more prevalent in Georgia. From a \$200,000 neuromonitoring bill to a \$200,000 surgeon's bill, we have seen providers charging egregious amounts.

**4. Unbundling**

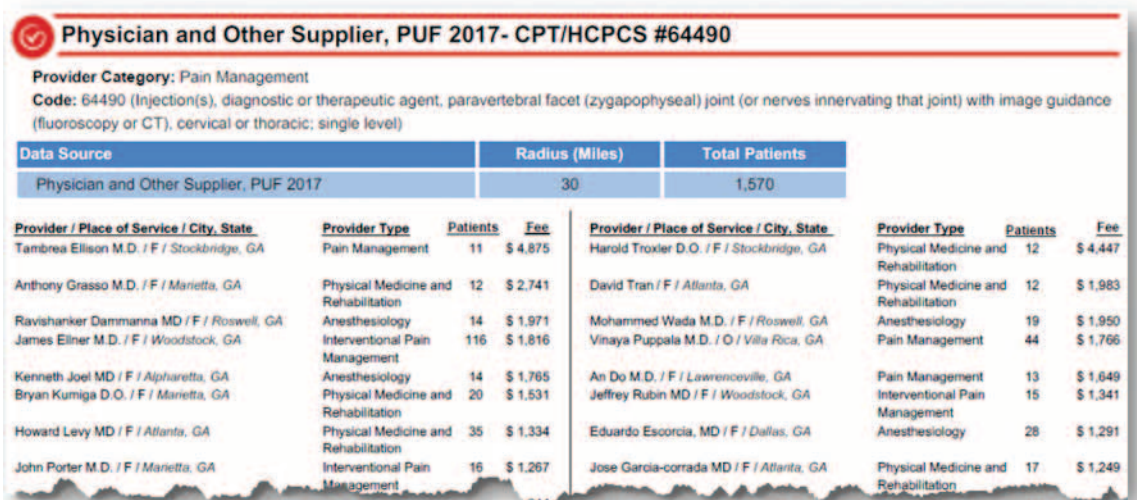
The last (but possibly the most important) billing practice to be aware of is unbundling. Unbundling occurs when a provider bills each component of a procedure separately, instead of billing a single correct code that includes the multiple components. Unfortunately, this billing practice is a common occurrence that we see far too often with treatment ranging from injections to spinal fusions to joint replacements.

Figure 3 is an example section

you start spotting the four tactics described above, and calling out the doctors on them, they will likely start whistling the blues. ♦

*Connor Beer is a Director with AccuMed HealthCare Research, a GDLA Platinum Sponsor. AccuMed is a technology company that uses a database of three billion records to determine the reasonable value of medical care based on physicians and facilities in the plaintiff's geographical area. AccuMed experts can not only analyze current medical bills, but also estimate future medical treatment costs.*

**FIGURE 3**



## Fact or Fiction

*Continued from page 44*

available data and/or fails to test different theories. Some data may be compatible with different ignition scenarios, making the style of testing the ignition theory critical. NFPA 921 states that “testing of hypotheses should be designed to disprove a hypothesis” (Reference 2). By testing a hypothesis with the intent to disprove it, an investigator will need to look at all of the available data to compare it against the hypothesis.

### 3. Data Collection and Analysis

In order to properly test a proposed theory, all available data must be recovered, documented and analyzed. Exclusion of data should only be considered if other data can conclusively prove its inaccuracy. Performing a thorough analysis of a site is paramount to a thorough and proper investigation.

Consider the following examples of initial cause determination theories, based on initial evidence:

- **Theory:** A laundry room fire that is determined to have been caused by ignition of lint in the dryer, due to reports that the dryer was in operation at the time of the event.
- **Theory:** A couch fire that is determined to have been caused by a cigarette due to reports that the occupants were smoking on the couch at the time of the event.
- **Theory:** A kitchen fire that is determined to have been caused by unattended cooking due to reports that the occupant was cooking prior to the fire and left oil on top of the stove.

All of these theories are plausible, however data collected at the scene may reveal a failed lithium ion battery in the laundry room, a failed power strip under the couch or all four heating elements ener-

gized on the stove—following further data collection.

Each fire has a distinct set of facts, unique time frames and different involved parties. A qualified investigator will perform a full and complete investigation regardless of the size of the fire scene and regardless of how familiar a fire scene first appears. In addition to fire patterns, arc mapping and witness statements, investigators should also consider security cameras, newspaper articles, real estate data, building department records and social media sites when collecting and analyzing data.

An entire report can be overturned due to one small missing detail. For instance, what happens when the alleged cooking fire on the electric range is countered with a statement from the utility company that they disconnected power to the home prior to the fire?

### 4. The Role of Witness Statements

Witness statements are crucial to any investigation. There is no better indicator of where a fire originated than an eyewitness statement from someone who saw it start or the emergency responders who can describe the fire in its incipient stage. Even statements from persons who did not witness the fire but who are familiar with what combustible materials were in the area prior to the fire can also be helpful to an investigation.

However, there are limits to the accuracy and reliability of witness statements. Most people are likely to be excited or emotional during a fire and, as such, may not recall events or facts accurately. For example, a witness may indicate that the entire room was engulfed in flames, while a second witness may indicate the fire was localized in the trash can. Not to mention that the third witness, who discarded his ashtray in the garbage can shortly before the fire, may lie and indicate that the fire was actually on the counter next to the toaster.

When analyzing witness statements, it is important to always attempt to substantiate eyewitness accounts with physical evidence or corroboration throughout the data collection process. One thing to note here is that a statement which first appears contradictory to other evidence should not be immediately dismissed as inaccurate. There may be a scientific reason why the witness statement doesn't seem to match. It could indicate a secondary fuel load or a change in ventilation during the fire. This is where the full analysis of all available data and theory testing come together to form a scientifically supported determination.

### 5. Industry Advancements

The evolution of technology and advancements in fire science have occurred in conjunction with an increase in research and testing of materials, fire dynamics and products. Fire science is changing not only as a result of the increased research, but also as a result of changes with construction methods, building materials, furnishings and home products. A qualified investigator will continue to seek out the most current science in pursuit of a scientifically supported ignition theory and fulfilling “NFPA 1033—The Standard for Qualifications of a Fire Investigator” which requires post-secondary educational training on 16 separate topics related to fire and explosion investigations.

### 6. Report the Facts

It is what it is; a fire investigator's responsibility is to report the facts or more accurately stated it is to deliver the news. The role of the fire investigator should always be to provide a professional, unbiased opinion as to the origin and cause of the fire. If the scientific method is applied properly, there should be no pre-conceived notions (expectation bias) and no personal stake in the determination of the cause of the fire. Fire investigators are

tasked solely with identifying how and why the fire occurred. It is important to leave the ultimate outcome of those findings to the other parties involved.

**7. Collaborate**

Reaching out to other experts with specific-field knowledge, whether it be a forensic engineer, contractor, appliance technician or utility lineman, will result in a more accurate determination. Working with others not only increases the amount and accuracy of data, but the collective knowledge can also assist with testing proposed theories, such as:

- The engineer may be able to exclude a heat source as being a potential and competent source of ignition because the thermodynamic analysis shows an inability to heat the first fuel to its ignition point.
- The manufacturer of a fire-place insert may be able to show that the exterior temperatures of a product are well below the ignition point of an identified first fuel.
- A public safety website might be able to point out a defect or recall in a product that supports a hypothesis.

The practice of having reports technically peer reviewed provides an additional layer of reinforcement in testing a proposed theory. In the scientific community, a theory is generally not accepted until published and reviewed by other scientists in the same field. The act of an independent technical peer review, even within an investigator’s company, shows that someone else has reviewed the data, attempted to disprove the theory and has also accepted the identified cause as valid and supported by the available data.

It is imperative to understand an investigator’s review process and if it meets the standards of a true technical review.

**Conclusion**

A scientifically supported fire cause determination requires both proper understanding and application of the scientific method, as well as an attention to detail and thoroughness required to obtain all available data with which to make and test a hypothesis. The legal requirements under *Daubert* [3] call for all testifying expert theories

“

*A scientifically supported fire cause determination requires both proper understanding and application of the scientific method, as well as an attention to detail and thoroughness required to obtain all available data with which to make and test a hypothesis.*

”

and opinions to be based on accepted scientific principles. This leads to the requirement to test the ignition theory either physically, analytically with available data or through the research of others. Failing to apply the scientific method along with accepted scientific theory, can result in exclusion of testimony at trial.

So, how do you know when a report is rooted in science? Consider objectivity, thoroughness of data

collection and how it was analyzed, what witnesses did and did not say, what we have learned from advancements in the industry, the presence of defensible facts, and if there were any other professionals called upon in the development and/or review of the report. If you are still unsure, have an outside subject matter expert test the proposed theory and see if they arrive at the same conclusion. ♦

**References**

[1] NFPA 921 4.3.6 Test the Hypothesis (Deductive Reasoning)  
 [2] NFPA 921 4.3.10 Confirmation Bias  
 [3] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

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*Stuart Morrison, PE, is Vice President, Fire Origin & Cause Practice at JS Held. He is a licensed Professional Engineer with a degree in Mechanical Engineering and a Graduate Certificate in Fire Protection Engineering. He has over 20 years of experience in fire investigation and the analysis of mechanical and electrical equipment related to the cause of fires. He also has nearly 25 years’ experience as a volunteer firefighter. He was a fire investigator with Montgomery County, N.Y., and is a certified fire investigator with designations including IAAI-CFI and NAFI-CFEI.*

## Tips for Mediation

*Continued from page 46*

mediator), could feel the weight of the paddle and see its size, instead of just a picture of it or a description of it.

### Think About Your Opening Statement

It is important to set the right tone for mediation from the very beginning. The first question to ask yourself is whether an opening statement/caucus is important or will it be counterproductive. If you do give an opening statement, many times it is very effective focus on the matters the parties AGREE on and not those they disagree on.

#### PROS:

- In a personal injury case, the adjuster gets to see the plaintiff;
- Chance for all to “buy into” the process;
- To be heard by the other side;
- Provides mediator an opportunity to gain credibility;
- Opportunity for the defendant to apologize to the plaintiff, if desired.

#### CONS:

- Can be unproductive and *counterproductive* if defense lawyer comes on too strong;
- Plaintiff’s lawyer risks inflating clients’ expectations if client not properly prepared;
- If there is animosity between the parties, an opening session might increase the animosity and further entrench the parties.

### Be Patient

Sometimes parties and their attorneys get impatient during mediation. Be patient. Usually a resolution involves parties changing their positions. This change takes time. Understand that change may be occurring for the opposing party while you are waiting for the mediator to return to your room. Resist the

urge to “cut to the chase.” Many times, a party will agree to a position during the afternoon of a mediation, that it would not have agreed to in the morning of the mediation. That is because change takes time. When a new position is not that far from your current position, you are much more willing to agree to it. For example, party who has just made an opening offer of \$25,000 to resolve a matter, will not immediately agree to pay \$100,000 to settle the case. During the mediation when the offer becomes \$75,000, they are much more likely to consider paying \$100,000, because that is not as far from their current position as it was when they had offered \$25,000. Most mediators know when to “make the ask,” so try not to rush the process.

### Speak the Same Language

Make sure that any offer or demand is clear. Ensure that it contains any conditions, make the conditions known from the first offer or demand. Some conditions could be deal killers, so should be explained as early as possible. For example, some cities require that any settlement made on a case against it be approved by City Council. That requirement will add time to finalizing the settlement and could make a difference to a plaintiff about whether to accept the offer. Perhaps one party wants a confidentiality provision in the settlement agreement. All these terms should be made clear early in the negotiation.

When using brackets to make a demand or an offer, make sure that everyone understands the ground rules. If the mediator does not ask about the rules or clarify the rules, bring it up yourself. Some think, when sending a bracket, it’s simply an invitation to negotiate between the two figures, while others think it’s sending a message that the party offering the bracket would pay/accept the midpoint. Having a misunderstanding on the meaning of the bracket could get the mediation off track very easily and quickly.

Understand that the defense room is rarely looking at the “midpoint” when negotiating. That is because defense cannot control the midpoint—to do so in some cases would necessitate starting at a negative number.

### Use the Mediator as a Messenger

the mediator as your messenger. It is the mediator’s job to deliver the “bad” news to the opposing party. An effective mediator can deliver the hard messages to the other side in a way that is not offensive, as it might be coming from opposing counsel. Instead of hammering at the other side in the opening session, let the mediator give your messages for you. Certain information cannot be conveyed to the other side without evoking an adverse reaction. A non-negotiable aspect of your position will likely bring a non-negotiable response from the opposing party. If those positions are related privately to the mediator, the mediator can express the position in a way that will diffuse the response. Hearing information from a third-party neutral is not as polarizing as hearing it from an adversary.

### Lastly ...

Do not wait until the day of mediation to bring important, case altering information to the other side. Do not wait until the day of the mediation (or even a day or two before) to advise there are a significant amount of additional medical expenses or damages. This type of new information needs to be reviewed and evaluated and that usually takes some time.

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## Human Fatigue

*Continued from page 48*

- Long Shift
- Stress
- Overtime
- Work-related worry
- Monotonous tasks
- Poor ergonomics
- Performance milestones

Indeed, the sheer number of fatigue hazards may make it difficult for organizations with little or no experience in fatigue management to properly identify, mitigate and control the risk associated with all the hazards. Another challenge that makes fatigue a somewhat unique workplace hazard is that fatigue-inducing activities and demands may arise outside the workplace. Employees can arrive at the workplace already fatigued from dealing with commutes, children, sleep disorders or other daily life issues.

Industry- and site-specific facility and operational features can pose unique fatigue risks. For example, some industries such as oil and gas extraction can require remote operations and it can be common to see schedules with runs of 14 contiguous days entailing 12-hour shifts. Attempts to hold organizations responsible for evaluating and controlling industry-, facility- and operations-specific risks may become more frequent as scientific and industry literature on fatigue management continues to grow.

### Traditional Approach to Fatigue Management

Individuals, companies and regulators have traditionally relied on prescriptive methods, such as imposing on-duty limitations [13]. Two common prescriptions are hours-of-service restrictions and minimum rest breaks. Prescriptions can be helpful in limiting some fatigue risk; however, stakeholders across industries are realizing that these prescriptions do not



commonly or specifically limit worker exposure to fatigue risks associated with typical human sleep patterns, duty cycles and non-work-related time [13]. To address these sometimes unique and variable risks organizations and regulators have been turning to more formal fatigue risk management practices.

### Fatigue Risk Management System (FRMS)

The FRMS is a risk-based approach being adopted in many industries to monitor and manage fatigue-related safety risks. These industries include, but are not limited to, aviation, commercial driving, rail, nuclear, and oil and gas. The FRMS takes a traditional safety management system (SMS) approach, which includes four basic components: policy, risk management (i.e., hazard identification, risk assessment and risk mitigation), assurance (e.g., auditing) and promotion (e.g., internal communication and training).

Whereas an SMS addresses many workplace hazards, an FRMS specifically addresses fatigue-related hazards. It then relies on scientific principles and operational experience to help personnel mitigate fatigue risk and work with proper alertness [1]. Different

FRMS versions exist across industries, but most versions entail the following elements:

- Introductory materials that convey purpose, objectives, scope and accountability;
- Policy statements that convey organizational commitment;
- Scientific information on sleep, fatigue and fatigue countermeasures;
- Fatigue risk-assessment (FRA) and countermeasure procedures and guidance;
- Assurance and continuous-improvement procedures and guidance;
- Fatigue awareness and training; and
- Implementation and communication plans.

Recent research has provided evidence that such fatigue management initiatives may be helping [14]. For example, data from 70 companies across a range of industries were analyzed to assess the relations between self-reported fleet safety management practices and motor vehicle collision and injury metrics. Results indicated that the presence and practice of fatigue risk management and mitigation policies and practices predicted lower injuries per million miles traveled [14].

### A Practical Approach

We have been helping clients meet fatigue management challenges by providing practical guidance on (a) developing an FRMS, (b) efficiently integrating it with the existing company SMS to save on effort and (c) assessing whether fatigue contributed to an incident within its incident investigation and root cause analysis protocols.

We have specifically focused on a core FRMS component—the fatigue risk assessment (FRA). Respecting that it helps to have relatable and practical ways to conduct FRAs, one type of FRA for



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which we have advocated is strategically designed to mirror an existing risk assessment process that is already well known to many safety professionals.

This FRA process is designed to (a) identify situations where fatigue may pose hazards; (b) assess the risks presented by those fatigue hazards; (c) note existing countermeasures; and (d) decide whether those countermeasures are adequate or whether additional ones are required to mitigate or control the fatigue risk. The FRA process therefore offers a systematic method for understanding the precursors to human error in incident scenarios. Such a process can be used by organizations to start addressing fatigue and, in turn, potentially reducing the liability of not addressing it. This approach can also be applied to evaluate factors related to human fatigue that may have contributed to an incident.

As alluded to above, another component of our fatigue-related work has focused on supporting clients who are alleged to have not adequately addressed fatigue through management oversight. Such allegations are typically connected to incidents involving serious injury or fatality. Claims are likely to be that the behavior of an employee was a proximate cause of the incident and that the behavior was driven by fatigue, which, in turn, resulted from poor organizational oversight of the employee.

One approach to this type of situation is to first review applicable company standards, policies and other administrative controls (SPAC), such as those directly addressing journey and fatigue risk management. Also important to assess are relevant regulatory and industry consensus standards. Some industries have regulatory standards that clearly apply, such as: (a) Federal Aviation Adminis-

tration (FAA) regulations in commercial and general aviation; (b) Federal Motor Carriers Safety Administration (FMCSA) regulations in commercial trucking; and (c) Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations in gas control room operations.

In some cases, however, no such regulatory oversight is applicable and instead voluntary consensus standards should be considered as references; context is especially important here, and care should be taken to understand that these consensus standards can exist in varying stages of maturity and visibility to industry stakeholders. In turn, these points have implications for what can be expected of a reasonable company given the constraints and common patterns of practice in its industry.

*Continued on next page*



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**Conclusion**

Whether and how these issues are brought to bear inevitably depends on the specifics of the case at hand. One thing is relatively certain, however: questions will not only be asked about whether regulatory prescriptions were satisfied but also about whether and how the conduct of the company accorded with literature on the emerging reference for fatigue risk management in workplace settings—the FRMS. Moreover, it is reasonable to expect the frequency of these sorts of questions to increase as this literature continues to develop. ♦

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## Mass Torts

*Continued from page 50*

could be caused, by other carcinogens. None of the expert witnesses tendered by the defendants offered any such testimony of alternate causation of Mr. Long's lung cancer and thus the defendants were precluded from such testimony at trial. Further, the trial court did not find defense expert, Dr. Allen Feingold, sufficiently qualified to testify regarding issues of potential medical malpractice since this was outside the scope of his qualifications. Thus, the trial court held that the defendants could not present testimony related to this topic at trial. The defendants appealed the trial court's order.

***Honeywell International, Inc. v. Sinyard***  
**Court of Appeals of Georgia**  
**A20I0157**  
**January 27, 2020**

Honeywell International filed an Application for Interlocutory Appeal

from a denial of a Motion for Summary Judgment in the case *Kevin Sinyard v. Georgia Pacific*, 2016CV273202, Superior Court of Fulton County. Honeywell's Motion for Summary Judgment argued that the plaintiff failed to present any evidence that he was exposed to any Honeywell products. The trial court denied Honeywell's Motion. The trial court found that Sinyard had worked at various places from 1979 to 1988, including Ford's Hapeville plant, Piedmont Hospital and several Georgia Power plants. Mr. Sinyard testified that he replaced gaskets and packing on Honeywell valves and that Honeywell supplied asbestos containing replacement gaskets and packing used by Mr. Sinyard. The trial court rejected Honeywell's bare metal defense finding Honeywell had designed its valves to need continuous replacement of the original gaskets and packing. Finding that Honeywell was a manufacturer under O.C.G.A. § 5-1-11, Honeywell thus had a duty to

warn and produce non-defective products. Therefore, Mr. Sinyard has valid claims against Honeywell for new Honeywell valves installed with asbestos components and each Honeywell valve where gasket and packing work was performed using asbestos replacement gaskets and packing.

Honeywell filed an Application for Interlocutory Appeal with the Court of Appeals of Georgia on January 2, 2020. The Court denied Honeywell's Application on January 27, 2020 in a one sentence order without any discussion or analysis of Honeywell's bare metal defense or the Court of Appeals' recent decision in *Davis v. FMC Corporation*.

***Union Carbide Corporation v. Brannan***  
**Court of Appeals of Georgia**  
**A20A0671**

Union Carbide appealed the denial of its Motion to Dismiss in *Louise Brannan v Union Carbide Corporation*, State Court of DeKalb



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## Mass Torts

*Continued from previous page*

County, Civil Action Number 16A62067-3. In the underlying action, Mr. and Mrs. Brannan filed suit against numerous defendants in an asbestos personal injury case. On October 5, 2015, Mr. Brannan died. One of the defendants filed a Suggestion of Death on October 14, 2015. On December 17, 2015, Mrs. Brannan was named as executrix of her late husband's estate. Not until September 14, 2016 did Mrs. Brannan file a Motion to Amend the Complaint, naming herself as the Executrix of the Estate. The defendants opposed the Motion to Amend as untimely. Mrs. Brannan voluntarily dismissed the case on September 30, 2016 and, on November 3, 2016, filed a renewal action naming the Estate as a party plaintiff. Union Carbide moved to dismiss the second case based on Georgia's prior pending case rule. The trial court denied Union Carbide's motion and allowed the second case to proceed, holding that one plaintiff could dismiss all the claims of multiple plaintiffs. The trial court further held that the personal representative of Mr. Brannan's estate was never served with the Suggestion of Death and thus Mrs. Brannan's Motion to Amend to substitute the Estate as a party plaintiff was timely made.

Union Carbide argued in its appellate brief that the trial court was incorrect in denying its Motion to Dismiss because Mrs. Brannan, individually, could not dismiss Mr. Brannan's claims when she dismissed the first suit on September 30, 2016 since she had not yet been substituted as a party plaintiff in the case. Since the personal injury claims from the first case were still pending, the second case was not proper under Georgia's prior pending case doctrine. Conversely, Mrs. Brannan argued that the trial court was correct in its ruling and that the dismissal of the first case was proper. The Estate was not in existence until December 17, 2015, when the Probate Court of Henry County entered an order approving Mrs. Brannan as the Executrix.

All briefs have been filed and oral arguments were held at the Court of Appeals on February 6, 2020. The Court of Appeals has not yet issued a ruling.

### RECENT BANKRUPTCY FILINGS BY DEFENDANTS IN ASBESTOS CASES

Two companies that have been long time defendants in asbestos-related injury cases across the country have filed for Chapter 11 Bankruptcy protection. These bankruptcy filings will have a direct impact on asbestos cases filed here in Georgia.

### CertainTeed Bankruptcy

On January 23, 2020, DBMP, LLC filed for Chapter 11 Bankruptcy protection in the U.S. Bankruptcy Court for the Western District of North Carolina. DBMP is the successor to the asbestos liabilities of CertainTeed Corporation, which manufactured asbestos cement pipe

and asphalt roofing materials. According to its Information Brief filed at the commencement of its Chapter 11 case, CertainTeed had incurred approximately \$2 billion in defense and indemnity costs during its time in asbestos litigation. Since 2002, CertainTeed has spent between \$80 million to \$160 million a year on its asbestos cases. In the 1990s, CertainTeed estimated that it usually spent \$10 million or less litigating and resolving asbestos claims against it. At the time of its filing, over 60,000 cases were pending against the company, approximately 32,700 of which were active.

### Owens-Illinois Bankruptcy

On January 6, 2020, Paddock Enterprises, LLC filed for Chapter 11 Bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware. Paddock Enterprises is the successor in interest to Owens-Illinois' (O-I) asbestos liabilities, which manufactured Kaylo insulation products from 1948 to 1958. O-I did not manufacture or sell any Kaylo products after 1958. At the time of filing, approximately 900 cases were pending against O-I. In pleadings filed with its Chapter 11 petition, O-I stated that it had disposed of more than 400,000 asbestos cases during its time as a defendant and incurred approximately \$5 billion in costs. Over the last three years (2016 to 2018), O-I's costs totaled \$340 million. ♦

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