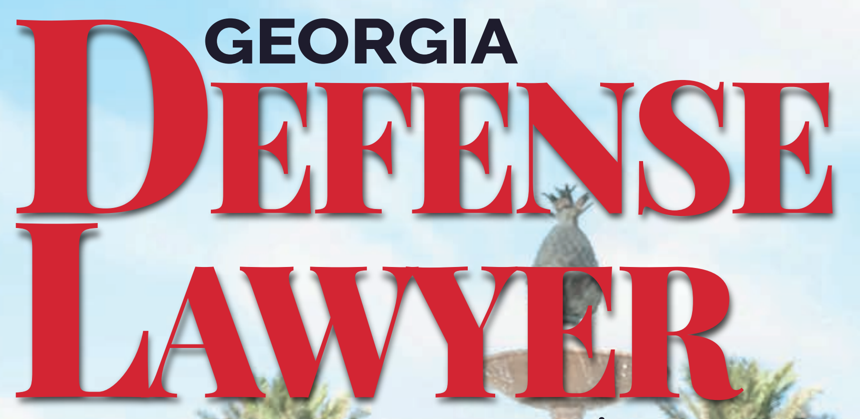

A Magazine for the Civil Defense Trial Bar

Volume XI, Issue II
Fall 2024

Navigating the Minefield of Time-Limited Demands

Wanted: Defense Lawyers in the Legislature

Labor & Employment Case Law Update

GDLA Law School Award Recipients Honored

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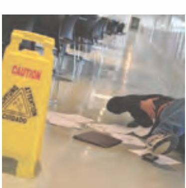
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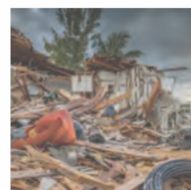
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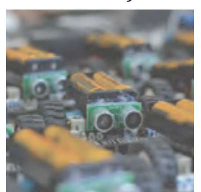
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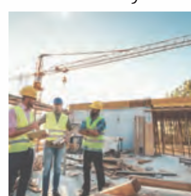
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GEORGIA DEFENSE LAWYER

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President's Message

Bill Casey

Eight years ago, Past President Matt Moffett approached me about joining GDLA's Executive Committee and serving as President of this fine organization in 2024-2025. I recall our conversation, which went something like this:

"Matt, do you realize how old I'll be in eight years?"

"How old are you now, Bill?"

"I'm 60 years old, Matt!"

"Oh, Bill, you'll be fine."

Not sure how fine I am but I publicly thank Matt for his confidence and for assuring me that possibly being the oldest GDLA President in the organization's history is really no big deal.

I am happy to report that, so far at least, Matt was right. It's no big deal because our excellent Executive Director, Board of Directors, Executive Committee, and membership are committed to continuing GDLA's long-standing events and projects while implementing new programs that take our tagline, "Advancing the Civil Defense Bar," to the next level.

> *"Please consider donating personally or asking your firm to contribute to GDLA's PAC to enhance our leverage under the Gold Dome."*

We had a terrific turnout in Ponte Vedra for our 57th GDLA Annual Meeting in June. Sixty members, many with their families, and representatives from 31 Gold and Platinum Sponsors, attended our Annual Meeting at Ponte Vedra. It was particularly good seeing a number of younger members and multiple Past Presidents there. Our CLE program speakers addressed interesting topics and suggested helpful solutions to troublesome issues the defense bar often encounters. Mark your calendar to join us when we convene at the Omni Amelia for our 58th GDLA Annual Meeting from June 26-29, 2025.

GDLA's Trial & Mediation Academy, one of our more popular events, was also a huge success under the leadership of Chair Anne Gower with 38 young lawyers attending in August.

Our goals for this year are substantial but, with those leading the charge and our membership's support, they are achievable. Our Political Action Committee (PAC) President, Jake Daly, is working with our Legislative Committee and lobbyist, Kade Cullefer, on multiple fronts to enact legislation we believe will significantly improve both sides of the civil bar. Jake drafted a bill to be presented to key members of the Georgia legislature. He is also sharing GDLA's position and the bill with various stakeholders. We have talked to GTLA's leadership about the legislation and solicited support from its membership. We are also talking to members of the Georgia House and Senate and hope to have the legislation ready to present during the 2025 General Assembly. Later in the year, I will share details about the legislation and solicit your support. To that end, please con-

Continued on page 48

Member News & Case Wins

MEMBER NEWS

GDLA Past **President Hall F. McKinley III** of **Drew Eckl & Farnham** in Atlanta received the State Bar of Georgia General Practice & Trial Section's Tradition of Excellence Award for the defense. The award is presented to four outstanding members of the section: one plaintiff's lawyer, one defense lawyer, one general practice lawyer, and one judge. The awards ceremony was held on June 4, 2024, at the 2024 State Bar Annual Meeting at the Omni Amelia Island.

C. Bradford "Brad" Marsh of **Swift Currie McGhee & Hiers** in Atlanta was the lawyer recipient of the 23rd Annual Thomas O. Marshall Professionalism Award by the Bench and Bar Committee of the State Bar of Georgia. The award is presented to one lawyer and one judge who demonstrate the highest professional conduct and have a paramount reputation for professionalism. Recipients are selected by a committee of State Bar Past Presidents, and were honored on June 7, 2024, during the State Bar's Annual Meeting at the Omni Amelia Island. Marsh was also appointed by State Bar President Ivy Cadle to a three-year term on the Institute of Continuing Judicial Education Board, which has provided continuing education and training since 1978.

Patrick T. "Pat' O'Connor, a partner with **Oliver Maner** in Savannah, was appointed by State Bar President Ivy Cadle to the Judicial Qualifications Commission (JQC). The JQC conducts investigations and hearings with respect to complaints of misconduct by Georgia judges, and is also authorized to issue opinions regarding appropriate judicial conduct

During the State Bar Annual Meeting in June, the Young Lawyers Division (YLD) presented a number of awards at its annual YLD Dinner. **Cayton Chrisman**, an associate in the Atlanta office of **Nelson Mullins**, was presented a YLD Award of Achievement for Service to the Profession.

Christian J. "Chris' Steinmetz, a name partner with **Gannam Gnann & Steinmetz** in Savannah, was elected by the State Disciplinary Board to serve as its chair. The group investigates grievances against lawyers, and serves like a grand jury determining whether there is probable cause to believe that a lawyer's conduct violated Bar Rules. GDLA Executive Director **Jennifer Davis Ward** also sits on the board as a non-lawyer member.

Groth Makarenko Kaiser & Eidex (GMKE) announced that **Amanda Coop** has been elected to partnership. The firm is proud to welcome her as the firm's first woman partner. She first joined GMKE in 2023 as of counsel, leading the firm's efforts to expand into Tennessee. Previously, Coop practiced in-house with one of the nation's largest insurers. After relocating home to Tennessee, she ran her own plaintiffs' personal injury practice focused on medical malpractice and premises liability cases. Since joining GMKE, Coop has focused on automobile, general liability, and insurance coverage. She will be based in the firm's Nashville, Tenn. office.

Swift Currie McGhee & Hiers in Atlanta announced the addition of **Paul J. Spann** as an associate. He centers his practice on civil defense of automobile litigation, catastrophic injury and wrongful deaths, premises liability, products liability, and appellate cases.

James Bates Brannan Groover announced the addition of **Matthew A. Laws** as an associate in its Macon office. His practice focuses on general litigation matters, including insurance defense.

Bouhan Falligant in Savannah announced the addition of **Jacob E. Saas** as an associate. His practice focuses on transportation, health care and professional litigation matters.

Alex McDonald has joined **Fortson Bentley & Griffin** in Athens as a partner. He is a trial and appellate lawyer who has practiced exclusively in civil litigation since 2014. McDonald's practice focuses on representing individuals and businesses in commercial litigation, personal injury, product liability, construction, and insurance coverage matters. McDonald also advises clients on handling pre-suit matters, internal investigations, and bad faith exposure. He has served as lead counsel in numerous civil jury trials across Georgia and appellate matters.

E. Tyron Brown, a partner at **Hawkins Parnell & Young** in Atlanta, was installed as President-Elect of the Atlanta Bar Association at its Annual Meeting in May.

Lisa Haldar, a partner at **Lawrence & Bundy** in Atlanta, was invited to join the Litigation Counsel of America (LCA) as a fellow. The LCA is an invitation-only trial lawyer honorary society that is limited to fewer than one-half of 1% of lawyers in the country, each of whom has been vetted for skills, expertise and service.

CASE WINS

Waldon Adelman Castilla McNamara & Prout attorneys in Atlanta have notched a few victories of late. On July 7, 2024, after a three-day

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trial in Gwinnett County, **Brian McCarthy** limited a verdict to an amount below what Plaintiff had already been paid as part of a prior limited liability release settlement. McCarthy represented the UM carrier and acted as lead counsel at trial. This was an admitted fault motor vehicle collision with $48,000 in alleged medical specials and an alleged future disc fusion at C4-C5 and C6-C7. Plaintiff sought treatment on the day of the accident and continued to treat conservatively for over a year and a half. In closing, plaintiff's counsel asked the jury for $1,463,000. After deliberations, the jury awarded $25,000. The defendant's liability carrier had already paid its $50,000 policy limits for a limited liability release, translating to no recovery against McCarthy's UM carrier client. Prior to trial, the UM carrier had offered $25,000.

Following a four-day jury trial in Bartow County, in May, Waldon Adelman's **Rakhi McNeill** and **Katie Rouse** secured a verdict for their client less than the pre-trial offer. The case was an admitted fault, rear-end accident resulting in moderate property damage to the involved vehicles. Plaintiff sought treatment at the emergency room within 24 hours of the accident. After being discharged from the ER, plaintiff sought treatment with a chiropractor before being referred for pain management. Plaintiff's treating physician noted a disc injury to the lumbar spine for which plaintiff underwent multiple types of injections and a percutaneous discectomy. The past medical specials were $240,698.20. Plaintiff also retained a life care planner and neurosurgeon who testified that plaintiff would need $232,000 in future treatment due to her lumbar pain returning within two years of her last treatment date. The defense retained a physiatrist as their causation expert and a billing expert. The defense position on causation was that Plaintiff did not sustain an injury to the disc in her lumbar spine and while Plaintiff's injection treatment was reasonable, the percutaneous discectomy was not reasonable and necessary. The doctor also testified that the strain type injury that Plaintiff sustained resolved by the date of her last treatment. The defense billing expert testified that the charges for plaintiff's treatment with the pain management doctor were not reasonable due to improper coding and inflated charges from the ambulatory surgery center. The plaintiff asked the jury to award almost $1,000,000. The defendant asked the jury to award the reasonable treatment at his expert's rate of reasonable charge plus pain and suffering for 15 months of treatment. After deliberating for approximately an hour, the jury returned with a verdict of $132,000, which was less than the $150,000 pre-trial offer.

Following a four-day trial in Clayton County in April, **Jack Parker** obtained a favorable outcome for his client. This was an admitted-fault accident involving a T-bone style collision. Plaintiffs had medical specials of $24,000 and $13,000 and treatment consisted of initial ER visits and several months of chiropractic treatment. Plaintiffs had each received $25,000 in pre-suit settlements. They rejected additional settlement offers of $20,000 and $25,000 at mediation. Plaintiff's counsel asked the jury to award each plaintiff well into the six figures. Parker asked the jury to award each plaintiff their medical bills and a reasonable amount for pain and suffering. The jury awarded $20,000 and $30,000 to the plaintiffs. Due to an offset from the prior plaintiff settlements, the plaintiffs will only receive $5,000 total as a result of the verdict.

After three full days of trial, on April 18, 2024, a DeKalb County jury found in favor of GDLA President-Elect **Ashley Rice's** client. This was a refiled lawsuit that was reached for trial eight years after the subject rear-end accident and six years after the defendant had originally been sued. Defendant admitted fault for the impact, which was relatively minor. No one reported injury at the scene. Plaintiff thereafter sought treatment for neck and back pain from the emergency room, a chiropractor, a neurologist, a physical therapist, and pain management. She introduced bills totaling just over $35,000. Plaintiff claimed MRIs showed a cervical herniated disc and lumbar disc bulge, though the defense's expert radiologist read the same MRIs as showing a normal spine. Despite having been in two subsequent accidents, plaintiff took the position that her injuries from 2016 never fully resolved and she had been in continuous pain for eight years. Plaintiff asked the jury to award $250,000. The defense's pre-trial offer was $30,000.

Following a four-day trial in Fulton County in April, **Kyle Joyce** and **Matthew Hurst** secured a defense verdict for their client. The case involved a disputed fault accident in which their client was cited for failure to obey a traffic control device. Further complicating matters was the fact their client appeared in court and pleaded guilty to the same. Both Plaintiffs fixed blame for the accident on the defendant, as did Plaintiff's accident reconstructionist and the investigating officer. Both Plaintiffs claimed serious shoulder injuries and were recommended to undergo surgery. At the close of trial, Plaintiffs' counsel asked the jury to award more than a million dollars. Prior to filing suit, Plaintiffs rejected offers totaling more than $150,000. After deliberating for less than an hour, the jury returned with a defense verdict.

Laura DeMartini Eschleman, of **Hall Booth Smith** in Atlanta, as lead counsel, secured a defense verdict in Bibb County, Ga. for a hospitalist in June 2023, while the jury issued a $40 million verdict against the doctor's co-defendants.

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The young woman patient experienced a sickle cell pain crisis in November 2017 when she sought treatment three times at an initial hospital before her death. She was initially sent home with fluids and pain medication from the local hospital. She returned to the same hospital four hours later and saw a nurse practitioner, who again discharged the patient upon a physician's advice, although that physician never saw the patient. The family returned with their daughter for the third time before the initial facility transferred the patient via helicopter to the hospital in which DeMartini Eschleman's hospitalist client worked.

The patient showed up to the second hospital in acute chest syndrome, a syndrome that was never verbalized to DeMartini Eschleman's hospitalist client on the transfer call. Her hospitalist immediately recognized that the patient had acute chest, and that she needed an exchange transfusion of her blood. However, none of the providers at the second hospital, including the ER doctor, the nephrologist, and most importantly, the hematologist, knew how to obtain the exchange transfusion, which could have been set up with the second facility's contract with the American Red Cross.

It is unclear what happened between the time the hospitalist called the hematologist and asked for help to save his patient and the time the order was issued to transfer the patient to a third hospital. The hematologist on call testified on cross-examination that he could have fallen back asleep. Once DeMartini Eschleman's hospitalist client and the ER doctor confirmed with multiple providers that an exchange transfusion could not be performed at the second hospital, they were ordered to transfer the patient to Atlanta. The young woman coded 10 minutes out from the Atlanta hospital and was resuscitated but died the next day.

After three weeks of trial and two hours of deliberation, the jury returned a $40 million verdict against the first two hospitals and attributed zero negligence to DeMartini Eschleman's hospitalist client, an independent contract who admitted the patient while working as a locum tenens doctor overnight.

Groth Makarenko Kaiser & Eidex (GMKE) attorneys in Duluth have enjoyed a series of successes this year. On June 28, 2024, the Georgia Court of Appeals reversed a trial court's denial of partner **Paul Groth** and senior associate **Eric Jorgensen's** Motion for Summary Judgment. The original lawsuit arose out of an accident at a hair salon, when a ceiling-mounted hairdryer dislodged and struck the plaintiff on the head. Plaintiff alleged $10,689 in medical bills as a result of the mishap. Defense counsel filed a Motion for Summary Judgment, arguing that there was no evidence that Defendant improperly installed the hairdryer or had actual knowledge that the hairdryer created a hazard. Plaintiff's counsel responded to the Motion for Summary Judgment and filed a request for oral arguments, which was granted. Plaintiff's counsel and Defense counsel argued in front of Judge Clarence Cuthpert, Jr.

Judge Cuthpert then denied Defendant's Motion for Summary Judgment finding that because the defendant retained a right under the lease to inspect, repair, and maintain the subject property, there remained a question as to whether the defendant fully parted with possession of the property. Defense counsel filed an Application for Certificate of Immediate Review, which was granted. Defense counsel then filed an Interlocutory Appeal of the trial court's order.

The Court of Appeals held that there was no evidence that the defendant retained possession of the leased premises, which was an essential element of the plaintiff's premises liability claim. The evidence offered by Plaintiff was insufficient to create an issue as to whether High West was an out-of-possession landlord, and as an out-of-possession landlord, Defendant would only be liable if Defendant knew or should have known the hairdryer was not installed properly or otherwise created a hazardous condition. Accordingly, the trial court's denial of Defendant's Motion for Summary Judgment was reversed. Judge Jeff Watkins wrote the opinion, to which Judge Sara Doyle and Judge Ken Hodges concurred.

The original case is *Michelle Reese v. Luv Dem Locs, LLC, Alicia Marston and High West, LLC*, State Court of Rockdale County 2021-SV-2574. The appellate case is *High West, LLC v. Reese*, Georgia Court of Appeals A24A0201.

After partner **Jay Eidex** previously won summary judgment in Houston County in a premises liability case in May 2023, the plaintiff appealed. The underlying case arose out of an incident that occurred in a restaurant. The plaintiff alleged he was injured when two employees of the restaurant were involved in a fight or altercation with each other and collided with the plaintiff causing injuries to his back and knee. Plaintiff alleged the defendant restaurant was negligent in keeping its premises safe, vicariously liable for the actions of its employees, and separately for negligent hiring and retention of the employees involved in the altercation. He did not sue the employees involved in the altercation.

The trial court entered an Order granting summary judgment finding that the plaintiff's claims as pled mixed theories of premises liability and ordinary negligence. The court found there was no evidence that the premises itself was unsafe. The court further found that the intervening intentional criminal conduct of the employees was outside the scope of their job duties and was the proximate cause of any injuries. Because it was outside the scope of the employees' job duties, the employer was not vicariously li-

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able for the actions of the employees. Finally, as to the issue of negligent hiring and retention, the court found that the record clearly demonstrated neither employee had any criminal record, history of disciplinary action or history of violence finding "zero evidence" of negligent hiring or retention.

The Georgia Court of Appeals affirmed the trial court's grant of summary judgment in an unreported opinion on June 25, 2024.

GMKE associate **Davis Lackey** won a defense verdict in a case that was tried to a jury in the State Court of Forsyth County in mid-June. The case was second chaired by associate **Donna Davis**. This case arose out of a motor vehicle accident that occurred on July 12, 2021, in Hall County, Ga., on northbound I-85 just before the I-985/I-85 split.

Lackey's client was traveling directly behind the plaintiff. Plaintiff was traveling directly behind a 3rd vehicle. There was a dispute as to how the accident occurred. The police report indicated that Defendant's car struck the rear bumper of Plaintiff's vehicle, which caused Plaintiff's vehicle to collide with a third vehicle. The impact caused the defendant's car to catch on fire. However, an independent witness stated that Plaintiff's vehicle collided with third vehicle before Defendant's vehicle struck the plaintiff's vehicle. No party was issued a citation.

Plaintiff presented to a chiropractor and then ultimately an orthopedist, Dr. Douglas Linville. He underwent imaging of his neck and back and ultimately had an epidural steroid injection in his lumbar spine. The total amount of medical bills presented at trial were approximately $21,000.

At trial, Plaintiff testified that he was traveling in the far-left lane when he was rear-ended by Defendant and pushed into the car in front of him. He was able to drive his vehicle from the scene. He started to experience neck and back pain a few days after the accident and sought medical treatment. Plaintiff denied prior injuries. Plaintiff also presented the testimony of Dr. Linville, who testified that Plaintiff had a disc herniation in his lumbar spine, which was acute and caused by the accident. He also testified that injury necessitated the epidural steroid injection. He also recommended Plaintiff undergo a microdiscectomy. Dr. Linville did admit on cross-examination that he did not recall ever physically meeting with or examining the patient.

Lackey presented expert testimony at trial from Dr. Barry Jeffries, an expert neuroradiologist, who opined that the injuries were degenerative in nature and pre-existed the accident. Further Dr. Jeffries also testified as to the extent of the Plaintiff's prior injuries. Lackey also impeached the plaintiff when he was not forthcoming about prior medical treatment for neck and back pain. Plaintiff further denied past treatment that was documented in his medical records.

During his closing, Plaintiff asked the jury to award all of the past medical bills and pain and suffering in a total amount of $452,600. Lackey asked the jury to return at most the past medical bills of $20,400 but argued that the facts merited a full defense verdict. The jury deliberated for approximately one hour and fifteen minutes before returning a defense verdict.

The case is *Eldin Banegas vs. Alyssa Ahrens*, State Court of Forsyth County, CAFN 22SC-1034-B.

Also in May, GMKE partner **Nik Makarenko** and senior associate **Doug MacKimm** won summary judgment on behalf of their client in the State Court of Gwinnett County. This case arose out of an incident that occurred on March 6, 2021. The Plaintiff was at a nightclub and alleged that when she was about to leave the establishment, one of the exits was blocked. She proceeded to the other exit and as she attempted to exit the building, she slipped on an unknown liquid/substance at the exit and fell on a walkway where there was an uneven ramp. This fall resulted in her suffering a fibula fracture and other ankle injuries. Plaintiff brought suit against the nightclub as well as Makarenko and MacKimm's client who was the landlord. She alleged the landlord was negligent for failing to keep the premises in good and safe condition, including specific allegations that the landlord failed to supervise common areas, failed to provide adequate ingress and egress, and failed to keep the premises clear of hazards.

Makarenko and MacKimm contended their client was an out of possession landlord that breached no duty to the plaintiff. After conducting discovery, they moved for summary judgment on behalf of their client. In their brief, they acknowledged their client was the landlord and the plaintiff was an invitee; however, their client had executed a lease with the nightclub owner and had parted with possession of the property pursuant to O.C.G.A. 44-7-14.

The plaintiff did not dispute that the landlord was an out of possession landlord, but alleged that the landlord did fail to repair certain defects and also failed to enforce the lease provision requiring the tenant to carry liability insurance. Further the plaintiff presented an affidavit with her response brief alleging her fall was due to a chipped tile on the floor (in contradiction to her deposition testimony) where she stated she slipped on a wet substance. She further alleged that by failing to enforce the lease provision requiring that the tenant carry liability insurance, the landlord assumed liability on the part of the tenant.

Judge Veronica Cope of the State Court of Gwinnett County granted summary judgment to the defense duo's client finding it was an out of possession landlord under the statute. She further made findings that the statements regarding the

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chipped floor were not supported by the evidence as Plaintiff's own deposition testimony had placed the cause of the fall on a wet substance and that allegations regarding the "chipped" floor's role in the fall were mere speculation. She further found the plaintiff's argument that the landlord assumed the liability of the tenant by virtue of failing to enforce its lease terms were unsupported by the law and unsupported by any provision of the lease agreement.

The case is *Amanda Brodie v. RSSS, LLC, Haven Restaurant & Lounge, BDB Lilburn Corners, LLC*, State Court of Gwinnett County, CAFN 21-C-08252-S6.

GMKE partner **Paul Groth** won a defense verdict for his client in a case tried in the State Court of Cherokee County in April. The case involved significant claimed medical special damages by the plaintiff including surgery for a torn rotator cuff. The suit arose out of a motor vehicle accident that occurred on January 29, 2015, when the defendant rear-ended the vehicle being driven by the plaintiff. The police report indicated the vehicles had slight damage and there were no injuries reported at the scene. Plaintiff did not go to the ER the day of the accident, but presented the following day with complaints of right shoulder and neck pain. She also treated with an orthopedic surgeon, undergoing rotator cuff surgery and ultimately a revision surgery when that surgery failed. At trial, the plaintiff claimed medical damages of approximately $157,000.

During the trial, the plaintiff presented testimony of Dr. Jeff Traub, an orthopedic surgeon who testified that the plaintiff sustained a torn rotator cuff in her right shoulder as a result the subject accident. He further testified that, while the plaintiff had pre-existing degenerative changes in her AC joint, because the plaintiff never had any pain or similar problems, it was the accident that either caused the tear or caused the tear to become symptomatic. Regarding the revision surgery, he testified that the plaintiff had a compromised rotator cuff from the accident and resulting surgery.

Groth called Dr. Barry Jeffries, a neuroradiologist who testified that the diagnostic studies showed a full thickness tear of the supraspinatus tendon, but also showed AC joint arthrosis and chronic degenerative changes along with no evidence of acute injury to the rotator cuff. He additionally testified the cervical spine had multi-level degenerative changes and no evidence of acute trauma. Groth also presented the testimony of Richard V. Baratta, a biomechanical engineer who testified that the Delta-V (change in velocity) was less than 5-7 M.P.H and that such an impact could result in minor cervical and lumbar sprains, but that the mechanism of injury and forces were not sufficient to cause a rotator cuff tear.

During his closing, the plaintiff's attorney asked the jury to award the past medical bills of $157,000 and pain and suffering of approximately $314,000 for a total award of $471,000. Groth asked the jury to return a defense verdict. The jury deliberated for 30 minutes and returned a defense verdict.

The case is *Connie Honea v. Morgan Allgaier*, State Court of Cherokee County, CAFN 16SC0992.

In April 2023, GMKE's **Jay Eidex** won a big victory for his client in a jury trial in the State Court of Fulton County involving a plaintiff who was a former NBA player alleging that injuries from a car accident prevented him from making a comeback to the NBA. In that case, plaintiff's counsel asked the jury to return a verdict in the amount of $22,017,949.94 plus an amount for pain and suffering at the jury's discretion. Eidex asked the jury to award a defense verdict. The jury deliberated for approximately three hours before returning a verdict in favor of the plaintiff in the amount of $100,000. That verdict was well below the defendant's pre-trial offer

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of $225,000. Further, the defense had filed an offer of settlement under O.C.G.A. 9-11-68 in that amount and Eidex announced his intention to file a motion for all the fees and costs of the defense under the Offer of Settlement. The hearing on attorney's fees under O.C.G.A. 9-11-68 was held in April 2024 where Eidex was cross-examined about his fees. Following the hearing, the court issued an award of fees in favor of Eidex's client and against the plaintiff in the amount of $175,054.45. Plaintiff was represented by Morgan & Morgan. The case is *Jordan Hill v. Connie Frew*, State Court of Fulton County CAFN 20EV002660.

Hawkins Parnell & Young attorneys based out of the firm's Atlanta office have been active in court. Partner **Matthew Barr** and a colleague obtained summary judgment in favor of the corporate healthcare provider TransformHealthRx (THRX) in the U.S. District Court for the Southern District of Georgia in April. This victory for Hawkins Parnell's client follows 10 years of litigation. The original lawsuit was a civil rights and tort action against the Effingham County Jail, Sheriff's Department, Board of Commissioners, and THRX. The plaintiff's executrix filed a renewal action with multiple federal and state claims related to the decedent's incarceration and medical treatment. Defense counsel countered the plaintiff's claims of improper medical treatment by THRX, arguing that the Federal Rules of Evidence, Georgia rules for experts in medical malpractice cases, and Daubert should be applied to find the plaintiff's expert testimony unreliable and inadmissible. Chief Judge J. Randal Hall granted THRX's motion to exclude the plaintiff's expert, Dr. Potts, and granted the Motion for Summary Judgment, ultimately leading to a 51-page order supporting THRX's position.

On April 18, 2024, Hawkins Parnell senior partner **Christine Mast** argued in the Supreme Court of Georgia for a law firm client against attempts to broaden the statute of limitations on malpractice claims. In the underlying case, restaurant franchisee David Titshaw alleged poor legal advice by two law firms led him to file for bankruptcy amid a franchising dispute with Moe's Southwest Grill. The bankruptcy ultimately failed and allegedly resulted in significant financial losses. Following a lawsuit alleging legal malpractice, the claims against Hawkins Parnell's client were dismissed by the trial court and the Georgia Court of Appeals applying a four-year statute of limitations. Titshaw's counsel argued before the high court that a 2010 Supreme Court decision expanded Georgia's time limit for attorney malpractice claims to six years if the claims were based on breach of a written contract. The case is *Titshaw et al. v. Geer et al.*, case number S23G1124, in the Supreme Court of Georgia.

Also in April, Hawkins Parnell partner **Debra LeVorse** secured a complete defense verdict for Dynamic Security Services in the Superior Court of Fulton County. The plaintiff sought $10 million for injuries sustained at a property operated by the Georgia Department of Revenue. The lawsuit stems from an incident at a DMV branch in Atlanta. The plaintiff alleged that an unsafe doormat caused her to fall and irreversibly shatter her knee, leading to five surgeries and nearly $1 million in uncontested medical expenses. She claimed the onsite security guards at Dynamic Security Services failed to prevent the accident by identifying and mitigating safety hazards from the mats. During the three-day trial before Judge Jerry Baxter, the trial team led by LeVorse dismantled the plaintiff's allegations and credibility. The defense undercut the plaintiff's account of the event with video evidence that showed the mat was flat before and during the incident. The trial team also destroyed her credibility when they exposed numerous contradictions the plaintiff made about her medical history in her deposition. The jury returned a complete defense verdict for Dynamic Security Services after only about an hour of deliberation. ◆

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

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Chambless Higdon Richardson Katz & Griggs, Macon

Brianna Blackmon
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GDLA Law School Award Recipients Honored

Jake McCarthy was presented the GDLA Rusty Gunn Award during the Mercer Law School Class of 2024 awards ceremony on May 9, 2024. This annual award, established in 2016 by GDLA, honors the memory of long-time Board of Directors member Robert R. "Rusty" Gunn.

Jake McCarthy and Mercer Law Dean Karen Sneddon

It recognizes a student whose professionalism is his/her badge of honor, and who quietly leads with strength, intelligence and good humor. During his time at Mercer Law School, he was elected the Student Bar Association 1L Representative, 2L Representative, and Vice President. He also served as a BARBRI Ambassador and member of Phi Alpha Delta and completed externships with Georgia Legal Services Program and Hero Practice Services, LLC.

Ethan Princenthal

Ethan Princenthal was the recipient of the 2024 Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award, sponsored by the GDLA, honors the memory of one the GDLA's founding members. Princenthal entered law school after graduating from the University of Georgia Terry College of Business in the Spring of 2021. In law school, he focused on tort, employment, and intellectual property law. He served on the *Journal of Intellectual Property Law* and as the President of the Privacy, Security, and Technology Law Society.

Over the summers, he interned for the Judge Anne Elizabeth Barnes of the Georgia Court of Appeals and at a prominent personal injury firm. As an intern of the Wilbanks CEASE Clinic, Princenthal represented youth in foster care, people abused as children, and survivors of human trafficking. After graduating,

Princenthal joined his father's personal injury practice and continues representing foster care youth pro bono on a part-time basis. ◆

GDLA Files Amicus Brief Answers Whether a Traffic Citation Alone Shows "Bad Faith"

On May 16, 2024, GDLA filed an amicus brief in Anthony Love v. John McKnight after the Georgia Supreme Court granted certiorari on the following issue: "Is evidence of traffic law violations by a party sufficient to create a jury question as to whether that party acted in bad faith for purposes of authorizing an award of the expenses of litigation under O.C.G.A. § 13-6-11?"

This case arises from a simple automobile accident involving stop and go traffic. Defendant pled guilty to following too closely. The trial court denied the defendant's Motion for Summary Judgment on Plaintiff's claim for bad faith under O.C.G.A. 9-11-68. The Court of Appeals affirmed, holding that "there is evidence to create a genuine issue of material fact on multiple potential violations of Georgia traffic laws. And, of course, Love pleaded guilty to the offense of following too closely and does not dispute that he did so." (Emphasis in original). There was no evidence of Love's ill will, motive of interest, or conscious wrongdoing to violate Georgia traffic laws. Because of the danger that this opinion could create a jury question in arguably every conceivable Georgia automobile accident case as to the existence of bad faith, GDLA decided to weigh in.

In its brief, authored by Sean Hynes and Russell Davis of Downey & Cleveland in Marietta, GDLA explained that "bad faith" under O.C.G.A. § 13-6-11 must require evidence showing the intentional disregard of the known rights of another. A traffic citation is not even conclusive of negligence, let alone bad faith. Further, the majority of traffic offenses are "strict liability" offenses in which no mens rea or guilty knowledge need be shown. State v. Ogilvie, 292 Ga. 6 (2012). A traffic ticket, therefore, does not authorize an award of attorney's fees for "bad faith" under O.C.G.A. § 13-6-11. GDLA also argued that O.C.G.A. § 13-6-11 should apply only to contract claims and not to tort or negligence claims because (1) the 2021 amendments to O.C.G.A. §§ 1-1-1 and 1-1-8 and (2) the framework of statutory construction set forth in Alton & Bird, LLP v. Hatcher Management Holdings, LLC, 312 Ga. 350 (2021).

The Supreme Court held oral argument on August 21, 2024. ◆

GDLA Files Amicus Briefs on Additional Terms in Offer to Settle Under O.C.G.A. § 9-11-67.1

On May 16, 2024, GDLA filed Amicus Curiae Briefs (the "Briefs") before the Georgia Court of Appeals in *Laura Wade Spencer v. Kelli Lamm*, Case No. A24A1334, and *Laura Wade Spencer v. Kelli Lamm*, individually and as Executor of the Estate of Michale Andrew Lamm, Case No. A24A1335.

The case in both *Lamm* appeals stem from a motor vehicle crash occurring in August 2021. Prior to filing suit, plaintiffs' attorney sent State Farm an offer of settlement, which was governed by the 2021 version of O.C.G.A. § 9-11-67.1. Plaintiffs' offer included numerous additional terms beyond the material terms outlined in § 9-11-67.1(a) and required State Farm to state in its written acceptance that, to the extent the offer conflicted with § 9-11-67.1, the terms of the offer would apply. State Farm sent a letter accepting the offer and including the requested language agreeing that the offer controlled over the statute.

Plaintiffs' attorney rejected payment, arguing State Farm failed to accept the offer for the following reasons:

1. State Farm included the claim number, loss date, and the name of the insured on the settlement check;
2. The settlement check stated that it must be endorsed by all payees;
3. The settlement check included the provision that "by endorsing this payment for your services, you agree not to use or disclose any personal customer information received from us unless necessary for the services we requested; and
4. State Farm's release stated that "Kelli Lamm releases Laura Wade Spencer ..." rather than stating that the release was "to release Laura Wade Spencer ..."

State Farm and Lamm moved to enforce the settlement. The trial court held that the 2021 version of § 9-11-67.1 did not restrict offers under that section to only the terms outlined therein and that the plaintiff continued to be "the master of [her] own offer" the common law principles articulated in *Grange Mutual Casualty Co. v. Woodard*, 300 Ga. 848 (2017). It went on to hold that additional terms could be included in the offer as long as they were agreed to by the parties. The trial court found that, because State Farm attempted to accept the additional terms in writing, it agreed to those terms being included in the offer, despite ultimately finding that State Farm's acceptance of the offer was ineffective.

In its briefs, GDLA begins by arguing that O.C.G.A. § 9-11-67.1 (2021) does apply, anticipating an argument from the plaintiff-appellee that the language of O.C.G.A. §§ 9-11-1 and 9-11-3 work together to limit the scope of the Civil Practice Act to only those instances where a complaint has already been filed, unless otherwise stated in the individual statute. The Briefs point out that this argument has no textual foundation and that it is contradicted by other provisions of the Civil Practice Act. The Briefs also point out that, by referring to the statute applying to "causes of action"—rather than just "actions"—after a certain date, the statute is contemplated to apply as soon as the cause of action accrues.

The Briefs go on to argue the trial court erroneously interpreted the 2021 version of § 9-11-67.1. GDLA urged the Court to recognize the 2021 revisions to § 9-11-67.1 were meant to do more than enlarge the period of time during which the statute applies, as the trial court held, and did in fact displace the common law principles of Woodard.

The Briefs further seek to guide the Court in interpreting the language of § 9-11-67.1. GDLA argued that the plain language of subsection (b)(1)—which states that the "only terms" an offer under the statute may include are those "outlined in subsection (a)," "[u]nless otherwise agreed by both the offeror and the recipients in writing"—requires written agreement to additional terms in an offer before the offer is made. The Briefs state any other reading would render the 2021 amendment, which is presumed to have been enacted with full knowledge of *Woodard's* interpretation of the previous version, ineffective as it would allow the same types of offers allowed under the previous version.

The Briefs further argue the legislature is also presumed to know the criticism of the previous version of § 9-11-67.1, which Judge Chris McFadden in a concurring opinion stated allowed plaintiff's attorneys to "set up" insurers by issuing offers with additional terms designed "to elicit rejections." *Wright v. Nelson*, 358 Ga. App. 871, 877-79 (2021).

GDLA also argued interpreting subsection (b)(1) to allow additional terms as long as there was ex post written agreement to them would render subsection (c), which states "[n]othing in this Code section is intended to prohibit parties from

reaching a settlement agreement in a manner and under terms otherwise agreeable to both the offeror and recipient of the offer," as nothing more than "mere surplusage." If subsection (b)(1) is interpreted to require ex ante agreement to the inclusion of additional terms in an offer, subsection (c) is properly read to confirm that any agreement reached through such an offer is valid.

The Briefs move on to discuss subsection (b)(2), which allows "[t]he recipients of an offer to settle made under this Code section" to accept such an offer "by providing written acceptance of the material terms outlined in subsection (a) of this Code section in their entirety." GDLA argued this section should be interpreted to mean, by its plain and ordinary language, that an offer governed by § 9-11-67.1 can be accepted by providing written acceptance to the material terms outlined in subsection (a). If the material terms are accepted, then there is a binding settlement agreement, even if the demand letter included additional terms.

The Briefs also pointed out that, even if the trial court were correct that an ex post agreement to additional terms—in an attempt to accept them—was enough to agree to their inclusion in the offer, the trial court's holding that State Farm both agreed to and rejected the additional terms makes no logical sense. GDLA argued that this holding says both that an agreement exists and that no agreement was formed. Even if this could be possible, the fact that plaintiff-appellee required acceptance of these terms through acts means that there was no meeting of the minds and no agreement because State Farm purportedly agreed to the terms in writing.

Finally, in applying § 9-11-67.1 to the case at hand, the Briefs argue the Court has two options. First, because the offer contained statutorily impermissible terms in the offer without first obtaining State Farm's written agreement, the Court could find that the offer itself was invalid and incapable of being accepted. Because plaintiff-appellee explicitly disavowed § 9-11-67.1 in the offer, GDLA reasoned this was a reasonable outcome and urged the Court to affirm the judgment below on different grounds, since the distinction between an invalid offer and an ineffective acceptance had legal repercussions to the parties in the ongoing litigation.

Second, GDLA argued that, to the extent the Court wanted to give effect to the offer despite its nonconformity with the statute, it should find that only the statutory material terms included in the offer were capable of being accepted and that, by providing written acceptance of the offer, State Farm accepted those terms and an enforceable settlement agreement exists.

GDLA thanks David Atkinson and Sarah Daley of Swift Currie McGhee & Hiers, Atlanta, who co-authored both *Lamm* briefs, as well as the *Redfearn* brief discussed on the next page.

The GDLA Amicus Committee is led by Co-Chairs Elissa Haynes of Freeman Mathis & Gray, Atlanta, and Philip Thompson of Ellis Painter, Savannah, and Vice-Chair Patrick Silloway of Balch & Bingham, Atlanta. ◆

GDLA Files Brief Supporting Petition for Cert on Additional Terms in Offer to Settle Under O.C.G.A. § 9-11-67.1

On August 8, 2024, GDLA filed an Amicus Curiae Brief in Support of Petition for Writ of Certiorari (the "Brief") before the Supreme Court of Georgia in *William Cole Redfearn v. Jaade Moore, et al.*, Case No. S24C1255.

The *Redfearn* case is on appeal from the Georgia Court of Appeals' opinion in *Redfearn v. Moore*, 371 Ga. App. 655, 902 S.E.2d 233 (2024). GDLA had filed an amicus brief in the Court of Appeals in April of this year.

In the case below, the Court of Appeals found common law principles of contract were not displaced by the 2021 version of O.C.G.A. § 9-11-67.1. With no analysis of the 2021 amendments to the statute, the Court of Appeals held that additional terms were allowed under the statute because the 2021 amendments did no more than "require certain material terms" to be included in an offer—despite the clear language of the statute stating only the material terms listed in the statute were allowed absent agreement of the parties.

Under the common law principles the Court of Appeals applied, a plaintiff is free to include terms not listed in O.C.G.A. § 9-11-67.1 in any settlement offer to which the statute applies and, if a defendant does not accept these terms as specifically set out by the offer, the defendant is deemed to have rejected the offer under the mirror image rule.

In the Brief, GDLA argues that the Supreme Court should issue a writ of certiorari in order to properly interpret the 2021 version of O.C.G.A. § 9-11-67.1. In doing so, the Brief describes the previous 2013 version of the statute and how it was interpreted by the Court in *Grange Mutual Casualty Co. v. Woodard*, 300 Ga. 848, 797 S.E.2d 814 (2017), which held the 2013 statute did not displace the common law principles and an offer could contain additional terms not listed in the statute. In response to this decision, the General Assembly enacted the 2021 amendments to the statute, specifically limiting the terms of any offer under § 9-11-67.1 to the material terms listed in the statute unless otherwise agreed by both offeror and recipient in writing.

GDLA contends that the Court of Appeals' dismissal of the 2021 amendments to the statute as only "requir[ing] certain material terms" is patently wrong and must be reviewed by the Supreme Court in order for a more rigorous analysis of the 2021 version of the statute. Because the case presents an important question of state law that is likely to recur and that should be settled by the Supreme Court, GDLA, as amicus curiae, requests the Court issue a writ of certiorari. ◆

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Navigating the Minefield of Time-Limited Demands

By Lia G. Melikian
Gower Wooten & Darneille, Atlanta

This article discusses new challenges faced by those tasked with responding to time-limited demands in Georgia, aiming to equip them with the knowledge and strategies necessary to effectively respond to those demands. Despite recent legislative changes aimed at curtailing "gotcha" settlement demands in Georgia, many legal professionals remain concerned about their practical effectiveness, especially in light of recent Court of Appeals decisions.

We will delve into the recent amendments to O.C.G.A. § 9-11-67.1, recent case law, trends in time-limited demands, and practical approaches for defense counsel handling these demands.

I. How Did We Get Here?

A minefield: this is the status quo for time-limited demands in Georgia, which are increasingly riddled with complicated terms and conditions designed to trip up insurance carriers. One small misstep can trigger a negligent or bad faith failure to settle claim, allowing claimants' attorneys to circumvent the insurance policy limits. So, how did we get here?

In the landmark case of *Southern General Ins. Co. v. Holt,* 262 Ga. 267 (1992), the Georgia Supreme Court solidified the right of an injured party to bring a claim against an insurance carrier for that insurance carrier's "negligence, fraud, or bad faith" failure to settle a claim when liability is clear and the special damages exceed the policy limits. Id. at 276. The Georgia Supreme Court in *Holt* also entrenched the principle that "[i]n deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured." *Id*. The Holt decision laid the foundation for holding insurers accountable for negligent or bad faith failure to settle, paving the way for potential abuse.

Notably, the Georgia Supreme Court in *Holt* specified that "[n]othing in this decision is intended to lay down a rule of law that would mean that a plaintiff's attorney… could "set up" an insurer for an excess judgement merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open." *Id*. at 276. However, the cases that came in the wake of Holt began to expand the ways in which a carrier could be "set up" for a bad faith claim.

A decade later, in *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683 (2003), the Georgia Supreme Court held that, when an insurer fails to respond to a reasonable settlement offer within the policy limits within the specified time frame, it may be liable for the resulting judgment on the grounds of bad faith refusal to settle. Id. at 686. The Georgia Supreme Court in *Brightman* established that "[j]udged by the standard of the ordinarily prudent insurer, the insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an ***unreasonable risk.***" *Id.* at 685 (emphasis added). In *Brightman*, the Georgia Supreme Court emphasized the issue of bad faith hinges on "whether the insurance company acted reasonably in responding to [the] settlement offer." *Id.* at 685. This decision further clarified the standard for a negligent failure to settle claim against an insurer, reinforcing the need for reasonableness in responding to settlement offers.

In *Frickey v. Jones*, 280 Ga. 573 (2006), the Georgia Supreme Court found that the carrier ***did not*** accept the settlement offer insofar as it attempted to condition the acceptance on resolution of the liens. *Id*. at 575-576. See also *McReynolds v. Krebs,* 725 S.E.2d 584, 588 (2012) (construing request to discuss how liens will be resolved a counteroffer). This ostensibly led to time-limited demands that explicitly precluded indemnification and lien satisfaction language in any settlement documents.

The original O.C.G.A. § 9-11-67.1 went into effect July 1, 2013, and attempted to curtail "gotcha" tactics in pre-suit offers by attempting to specify the mandatory material terms and time parameters to be included as part of such offer. However, "gotcha" demands became increasingly common, especially in the aftermath of the Georgia Supreme Court decision in *Grange Mutual Casualty Company v. Woodard*, 797 S.E.2d 814 (Ga. 2017). In *Woodward*, the Georgia Supreme Court held a claimant can include any terms desired and have those terms be "material." *Id*. at 821. The Georgia Supreme Court stated the five material terms listed in the 2013 version of O.C.G.A. § 9-11-67.1 are only the ***minimum*** conditions which must be included in a demand. *Id*. at 820.

The Georgia Supreme Court somewhat limited the scope of what constitutes failure to settle in *First Acceptance Ins. Co. of Ga., Inc. v. Hughes,* 305 Ga. 489 (2019). There, the Georgia Supreme Court reviewed an alleged settlement offer with no clear deadline and concluded that "an insurer's duty to settle arises only when the injured party presents a ***valid offer*** to settle within the insured's policy limits." *Id*. (emphasis added). It seems *First Acceptance* may have encouraged claimants' attorneys to send time-limited settlement demands with clear deadlines in all instances.

Continued on page 50

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By Jacob E. Daly
Freeman Mathis & Gary, Atlanta

Lawyers have played a prominent role in shaping the law since the nation's founding. Almost half (25 of 56) of the signers of the Declaration of Independence were lawyers, and 60% (33 of 55) of the delegates to the Constitutional Convention of 1787 were lawyers.[1] More than half (52.6%) of the members of the First Congress were lawyers.[2] The percentage of lawyers in Congress peaked at 79.5% in 1849-1850, and although there has been a steady decline in this percentage since then,[3] lawyers still make up 34.2% of Congress.[4]

Although historical data about lawyers serving in state legislatures is difficult to find, the trend is similar to the downward trend for lawyers in Congress.[5] Nationally, the percentage of state legislators who are lawyers decreased from 22.3% in 1976 to 14.4% in 2015.[6] Currently, in Georgia, there are only 30 lawyers (12.7%) in the 236-member General Assembly (14 Republicans and 16 Democrats). Eight of 56 (14.3%) members of the Senate are lawyers (five Republicans and three Democrats): Bill Cowsert (R-Athens), Jason Esteves (D-Atlanta), Bo Hatchett (R-Cornelia), John Kennedy (R-Macon), Josh McLaurin (D-Sandy Springs), Elena Parent (D-Atlanta), Brian Strickland (R-McDonough), and Blake Tillery (R-Vidalia).

Twenty-two of 180 (12.2%) members of the House of Representatives are lawyers (nine Republicans and 13 Democrats): James Burchett (R-Waycross), Omari Crawford (D-Decatur), Terry Cummings (D-Mableton), Saira Draper (D-Atlanta), Chuck Efstration (R-Auburn), Stacey Evans (D-Atlanta), Stan Gunter (R-Blairsville), Scott Holcomb (D-Atlanta), Soo Hong (R-Lawrenceville), Trey Kelly (R-Cedartown), Dar'shun Kendrick (D-Lithonia), Rob Leverett (R-Elberton), Marvin Lim (D-Norcross), Tanya Miller (D-Atlanta), Mary Margaret Oliver (D-Decatur), Esther Panitch (D-Sandy Springs), Sam Park (D-Lawrenceville), Matt Reeves (R-Duluth), Shea Roberts (D-Atlanta), Deborah Silcox (R-Sandy Springs), Tyler Smith (R-Bremen), and Anne Allen Westbrook (D-Savannah).

These 30 lawyers have a wide variety of practice areas, including commercial litigation, real estate law, family law, and criminal defense. One currently works for the Southern Poverty Law Center, and one previously worked for the ACLU. One is a retired district attorney and superior court judge. One works for Positive Impact Health Centers, which is a non-profit organization whose mission is to end HIV/AIDS in Georgia.

A diversity of legal expertise in the General Assembly is undeniably beneficial to the legislative process because of the variety of issues that are a matter of state law. However, GDLA is a professional organization of civil defense lawyers, and it is particularly interested in promoting fairness in how the civil justice system operates for everyone. Too many aspects of the civil justice system do not work fairly for defendants in tort cases, which is why GDLA advocates for certain tort reform measures that will level the playing field.

One way to accomplish this goal is to elect more tort defense lawyers to the General Assembly. Only two current legislators, Senator Bill Cowsert and Senator John Kennedy, practice tort defense, whereas at least nine represent plaintiffs in tort cases and one represents plaintiffs in civil rights (constitutional tort) cases. Several others are known opponents of tort reform even though they do not practice tort litigation.

So why is the lack of tort defense lawyers in the General Assembly a problem? Most obviously, it prevents proponents of tort reform from having a voice directly in the legislative process. The public cannot expect all legislators to be knowledgeable about all issues, and so a legislator who is a farmer may need help understanding the nuances of a tort reform bill, just like a legislator who is a lawyer may need help understanding the nuances of an agricultural bill. Legislators can educate their colleagues about issues in which they have expertise, and those who support tort reform can spread the message to others.

Without more tort defense lawyers in the General Assembly, the non-lawyer legislators have no choice but to turn to other lawyer-legislators or to outside interest groups and lobbyists. This does not solve the problem because many of the other lawyer-legislators are either opponents, or only indifferent proponents, of tort reform. Making matters worse is GTLA's powerful lobbying presence at the Capitol. Since GTLA created its PAC in 2002, it has donated several million dollars in campaign contributions to political candidates, not to mention the money contributed individually by its members. To be sure, members of GDLA also contribute individually to political candidates, but since its founding in 1967, GDLA has never donated to a political candidate's campaign. Nor has GDLA's lobbying entity since its creation in 2021.

This is not intended to suggest that legislators' votes can be bought with campaign contributions, but it would be naïve to believe that they do not matter. Indeed, GDLA initiated a formal lobbying effort in 2021 when it created a lobbying entity and hired a lobbyist, Kade Cullefer of

Troutman Pepper Strategies. Kade has done a tremendous job representing GDLA's interests at the Capitol over the last few years, but we need to do more to help him help us.

Fundraising for GDLA's lobbying activities is necessary, but the purpose of this article is to illustrate the importance of having more of us in the General Assembly and of supporting our colleagues who are interested in serving. After all, fewer tort defense lawyers in the legislature means greater influence of GTLA because of its extreme financial advantage and the absence of an inside voice for tort reform. We cannot match GTLA's financial strength at this time, but we can reduce the effectiveness of its financial advantage by electing more of our members, who will be immune to GTLA's influence and well-positioned to counteract it.

So why aren't there more tort defense lawyers in the General Assembly? Well, there are many good reasons for anyone, not just tort defense lawyers, not to run for elected office. But the reasons specific to tort defense lawyers are typically job-related. Every year, the legislative session lasts at least three months, and there are also significant time commitments when the legislature is not in session. Most tort defense lawyers work on a billable-hour basis, and so the amount of time required for legislative duties creates a financial hardship, not to mention a family hardship. Assuming a legislator wants to be re-elected, campaigning and fundraising further decrease the time available for practicing law and for family.

So how do we get more tort defense lawyers in the General Assembly? The answer to this question is easy to answer but difficult to implement. That is, both the lawyer who wants to be a legislator and his or her law firm must accept some sacrifice in exchange for potential benefits. Maybe the lawyer should accept a slightly decreased salary, but so too should the firm make it possible for the lawyer to serve by accepting a decrease in revenue generated by the lawyer without a proportional decrease in the lawyer's salary.

Of course, it is easy to say that someone else, or another firm, should accept a financial sacrifice for the greater good. Maybe that is not possible for all tort defense lawyers and their law firms, but it is undoubtedly possible for many. Moreover, serving as a legislator is not without its benefits. Some benefits may not be realized immediately, but it is not a stretch to say that serving as a legislator will likely bring tangible and intangible benefits to both lawyer and law firm.

Lawyer-legislators in general are a dying breed, and lawyer-legislators who practice tort defense are nearly extinct. But unless GDLA suddenly becomes as well-funded as GTLA, an important tool for accomplishing our mission must be to elect as many of our members as possible to the General Assembly.

To our members: If you have a desire to serve in the legislature, please give serious consideration to running in 2026.

And to the leadership of our members' law firms: If there is a lawyer in your firm who wants to serve in the legislature, please do everything within reason to help that lawyer attain that goal. ◆

Jacob E. "Jake" Daly is Senior Counsel in Freeman Mathis & Gary's Atlanta office. Since the formation of GDLA's Political Action Committee in 2021, he has led the group as PAC President. Daly is a member of the GDLA Board of Directors.

GDLA Political Action Committee (PAC) Donors

GDLA established its PAC in 2021, and since that time the following firms have contributed funds to support it. We are extremely appreciative of these firms' generosity and encourage other firms to consider donating this year.

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Labor and Employment Case Law Update

By Robert Luskin, Substantive Law Section Chair (left) and
Graham Newsome, Section Vice-Chair, *Chartwell Law, Atlanta*

In March, the U.S. Court of Appeals for the Eleventh Circuit issued an Opinion in the case of *LaThenia Joy Baker v. Upson Regional Medical Center*, Case No. 22-11381 (March 8, 2024). The case involved federal law claims under the Equal Pay Act of 1963 (EPA), which amended part of the Fair Labor Standards Act with the intent of ridding the workplace of pay disparity based on sex, and Title VII of the Civil Rights Act of 1964. The Eleventh Circuit affirmed a trial court ruling from the Honorable Tilman E. Self, III, of the United States District Court for the Middle District of Georgia. Upson Regional Medical Center (Upson) was represented by the authors.

A pretext analysis does not follow the employer's presentation of evidence for establishing an affirmative defense.

Dr. Baker began working at Upson in March 2015 as a physician OB/GYN. At that time, Dr. Baker had been a practicing physician for two and a half years and did not have any certifications or fellowships. In addition to her base salary, signing bonus, moving expenses, and student loan reimbursement, Dr. Baker was eligible for incentive compensation based on her daily output for medical services provided. Following contract negotiations between the parties and their attorneys, Upson provided Dr. Baker a tiered bonus compensation structure, allowing her the ability to ramp up her practice as a new OB/GYN and earn bonus compensation at a lower threshold. A male OB/GYN physician who began working at Upson at around the same time as Dr. Baker was offered a higher bonus structure. This disparity in the two physicians' bonus structures ultimately formed the basis for Dr. Baker's lawsuit, filed on July 14, 2020.

On March 17, 2022, Judge Self granted Upson's motion for summary judgment, finding the Title VII claim to be time-barred and focused mostly on the EPA claims. The district court's analysis focused on Dr. Baker's allegation that the disparity in her initial bonus structure and that of the male physician was because of her gender. The district court held that Dr. Baker failed to prove a *prima facie* case of discrimination under the EPA, and Upson did prove that the disparity was due to a "differential based on any factor other than sex" to show that it did not violate the EPA. Upson argued, and the district court agreed, that the initial bonus structures were different because Dr. Baker's structure allowed her to ramp up her practice and earn bonuses at a lower threshold. Furthermore, Dr. Baker's initial bonus structure was the result of an arm's length negotiation between the parties and their attorneys. The district court found that the record showed Upson relied on multiple factors other than gender to set Dr. Baker's bonus structure.

Dr. Baker filed an appeal with the Eleventh Circuit on April 18, 2022, and the parties presented oral argument on July 20, 2023, to the Honorable William Pryor, Chief Judge, the Honorable Jill Pryor, Circuit Judge, and the Honorable David Proctor, District Judge sitting by designation. In a per curiam opinion, the Eleventh Circuit affirmed the grant of summary judgment.

In doing so, the Court also clarified the standard for EPA claims at the summary judgment stage; first, a plaintiff must only meet the "fairly strict standard" of proving that substantially similar work was performed for less pay. Once this *prima facie* case has been satisfied, "the burden of both production and persuasion shifts to the employer to show that the pay differential was justified" under one of the EPA's four affirmative defenses. A pretext analysis does not follow the employer's presentation of evidence for establishing an affirmative defense. Rather, the questions a trial court must then answer are, "whether the defendant has shown that the evidence is undisputed, and that no reasonable juror could find sex was a factor in the pay decision." ◆

Robert Luskin is a partner with Chartwell Law in Atlanta. He has extensive experience in the areas of product liability, premises liability, professional negligence, questionable insurance claims, and other insurance coverage matters. He also defends companies in employment related matters, including discrimination and harassment issues. Luskin serves as GDLA's State Rep to DRI.

Graham Newsome is also a partner with Chartwell. He defends corporations in administrative charges and lawsuits arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and the Americans with Disabilities Act, as well as related state laws.

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Confidentiality, Self-Determination, and Effectively Utilizing the Joint Session

By Charles M. McDaniel, Jr.
BAY Mediation & Arbitration Services

Introduction

Mediation has significantly evolved since its early days in the 1980s and 1990s, when it was often misunderstood and misapplied. In one of my initial experiences with mediation, the opposing party refused to negotiate and insisted on arguing the case's merits through the mediator. The case quickly reached an impasse, and during the final caucus, the mediator reported that the opposing party expected a forced settlement on their initial terms. This scenario, though extreme, reflects the many instances of dysfunction that characterized mediation in its infancy.

Despite these early challenges, the Supreme Court of Georgia recognized the importance of alternative dispute resolution (ADR) in meeting the 1983 Georgia Constitution mandate to provide "speedy, efficient, and inexpensive resolution of disputes and prosecutions," *GA R ADR Rules, Introduction,* (April 15, 1993), and established the Commission on Alternative Dispute Resolution. This Commission was tasked with gathering information, implementing pilot programs, and preparing recommendations for a statewide ADR system.

What eventually followed was a greater embrace of mediation by practitioners, the emergence of private mediation firms, and the integration of mediation into court case management orders due to the court sponsored ADR programs. Today, with a deeper understanding and increased familiarity with the mediation process, it can be used as an effective tool—much like discovery—in achieving a favorable and often early resolution of litigation. However, to leverage mediation effectively, it is crucial to recognize the power of confidentiality and self-determination and embrace the uniqueness of the joint session.

Confidentiality

A critical component of the Alternative Dispute Resolution Rules, adopted in 1993, is the emphasis on confidentiality. According to *Ga R ADR Rule VII*, "[a]ny statement made during a court-annexed or court-referred mediation...is confidential, not subject to disclosure, may not be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding." Additionally, "[a]ny document or other evidence generated in connection with court-annexed or court-referred mediation...is not subject to discovery." *Id.*

Following these guidelines, the Georgia Commission on Dispute Resolution, established by the Georgia Supreme Court, created Model Court Mediation Rules. These rules similarly stipulate that "[a]ny statement made during a mediation or as part of intake by program staff or mediator in preparation for a mediation shall: (1) be confidential; (2) not be subject to disclosure; (3) may not be disclosed by the mediator or program staff; and (4) not be used as evidence in any subsequent administrative or judicial proceeding." Furthermore, "any document or other evidence generated in connection with a mediation is not subject to discovery." *Model Court Mediation Rules, Rule 8 A and B.*

As mediation continued to expand through greater adoption of ADR programs by the Courts and the exponential growth of private mediation, The Georgia Commission on Dispute Resolution issued an Advisory Opinion, addressing "the ethical obligation of mediation confidentiality and the ethical conduct to which all mediators, attorneys and parties involved in mediation should aspire." *Advisory Opinion 8*. In this advisory opinion, the Commission focused on the importance of confidentiality in "encouraging more open communication among the litigants while limiting the disclosure of information that may not be probative, may be inadmissible, or may be prejudicial in a later legal proceeding." *Advisory Opinion 8*, Georgia Commission on Dispute Resolution, p. 2 (November 18, 2013)

In this Advisory Opinion, the Commission emphasized that "confidential communications include the mediator's and the attendees' words, actions, documents, information, and conduct in the mediation, including the mediator's notes and records." *Id*, at p. 3. Confidentiality not only extended to documents prepared exclusively to be disclosed for use in mediation, but also the fact that some documents and information, otherwise discoverable, were used in mediation. *Id.*

Eventually, after years of study by numerous stakeholders in the court

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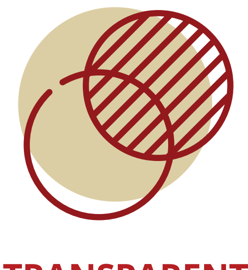

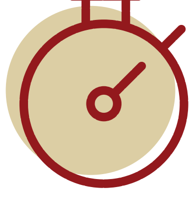

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Environmental Considerations in Fire Investigations

By Kimberly L. Davis
FORCON International

Introduction

When a fire at a business facility is reported in the news, often our minds go to the obvious concerns: was anyone hurt or killed? If the business is a place that we frequent and/or rely on for personal or business reasons, we may worry about whether the business will be able to reopen. If we work at the business, or have friends or relatives that do, we may be concerned about the length of time livelihoods will be impacted. In the case of large, industrial fires, we may wonder if toxic gases were emitted during the fire—did we accidentally breathe in polluted air that may have adverse health effects?

Other impacts of an industrial fire may be less obvious to the general public, but of great importance to the business owner. Can he/she continue to pay employees until the business can reopen? Assuming the business is insured, work must begin immediately to assess whether physical losses are covered, and at the same time, the necessary steps to reopen as soon as possible. In the case of a manufacturing/production facility, the structural integrity of the building must be checked to ensure safe entry. Potential contamination needs to be assessed in situations where asbestos insulation may be newly exposed and areas where spills occurred when containment of chemicals/source material was compromised. This preliminary assessment allows workers to be equipped with appropriate protective gear as they assess damage to process equipment, power sources and wiring, and stabilize salvageable hardware and machinery to prevent further deterioration (e.g., measures to prevent rust on exposed metal surfaces). Next, appropriate service contractors must be scheduled to repair building damage and replace unsalvageable equipment and components. And probably most importantly, a forensic analysis should be conducted (most likely required by the insurance company) to determine how the fire started, in order to take steps to prevent such an accident in the future.

There is also the question of potential environmental liability due to an event such as a fire. Liability for a possible environmental accident is an incentive for purchasing adequate insurance coverage, not only to avoid bankruptcy, but also to have sufficient coverage for potential environmental litigation. Liability for environmental damages can be imposed either statutorily or under common law. If the damaged business is forced to go bankrupt and is abandoned, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or the "Superfund" Act) serves to statutorily hold the business owner (the responsible party) liable for the costs of cleaning up environmental pollution from the business. Another statutory environmental liability law is the US Oil Pollution Act of 1990, which enforces removal of spilled oil (a common environmental contaminant of concern) and assigns liability for the cost of cleanup and damages. However, third party victims who claim to suffer damages as a result of exposure to contamination from an environmental release must seek compensation under common law, which is notoriously difficult. This difficulty is due to the burden of proof that falls on the plaintiff for establishing a causal relationship between the defendant's harmful conduct (e.g., a business owner's potential negligence which contributed to a fire spreading contamination) and the plaintiff's injury.[1,2,3,4]

Environmental Forensics of Fire Effluents

Investigation of the potential release of toxic fire effluents, the subject of this article, may require additional environmental forensic analysis of a fire event to identify whether the business owner and the insurer should be concerned about impacts to the environment, such as human and wildlife exposure to toxic chemicals. If a release of toxic chemicals is suspected, the nature and sources of this chemical contamination need to be identified, and the migration pathways and fate determined. Environmental forensics employs techniques such as age-dating and chemical fingerprinting, which have been used for decades to allocate responsibility to potential responsible parties for cleanup costs at Superfund sites and sites with leaking petroleum underground storage tanks, to check for contamination problems prior to property transfer, and in litigation cases to determine the source of marine oil pollution and other anthropogenic damage to natural resources.[5,6]

In the case of a fire investigation, forensics helps to differentiate between levels and types of contamination of a site which may have existed prior to the fire and after the fire, through an investigation of site use history. Interviews with site personnel conducted by experts of specific industrial operations and review of both internal and public records help to shed light on the efficacy of prior business practices at the

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Shelly Weed is a former police officer with 18+ years of crash reconstruction experience. She worked thousands of crashes during her law enforcement career. Shelly has testified as a crash reconstruction expert in Courts across Georgia, but she has also been qualified as an expert in human factors and occupant kinematics as they relate to crash reconstruction. She is fully accredited as a Traffic Accident Reconstructionist (ACTAR #2528). Shelly's breadth of expertise translates into a more thoughtful, tailored, and thorough analysis of every crash.

Amber Bishop is an ACTAR accredited Traffic Accident Reconstructionist (ACTAR #3780) and a licensed attorney. Amber has a degree in physics, a masters from Emory, and extensive accident reconstruction training. Prior to joining WREC, Amber was a litigator at a highly respected law firm in Atlanta. She worked at the Centers for Disease Control and Prevention as a research scientist and epidemiologist before attending law school. Amber has worked hundreds of crashes in her years at WREC. Amber's scientific knowledge, legal experience, and attention to detail touch every case WREC handles.

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The Importance of Forensic Accounting in 2024

By Chris T. Frederick
Bennett Thrasher

Forensic accounting is a specialized field within accounting that involves the utilization of investigative techniques to uncover financial discrepancies, fraud, or other irregularities within businesses or financial transactions. It essentially combines accounting, auditing, and investigative skills to analyze financial records and provide evidence for legal proceedings. Now, amidst evolving financial landscapes and technological advancements, the importance of forensic accounting has only intensified. Let's delve deeper into its significance, functions, and the trajectory it currently follows.

Forensic Accounting in the Current Financial Landscape

Forensic accounting is crucial in various aspects of business and law enforcement. Here are some key reasons why it continues to be important today and in the future:

1. **Fraud Detection and Prevention:** With the increasing complexity of financial transactions and the evolution of technology, the methods of committing financial fraud are becoming more sophisticated. Forensic accountants play a critical role in detecting and preventing fraud by examining financial records thoroughly, identifying irregularities, and implementing controls to mitigate risks.
2. **Litigation Support:** Forensic accountants provide expert assistance in legal proceedings involving financial matters. They analyze complex financial data, prepare reports, and provide expert testimony to help lawyers, judges, and juries understand financial issues related to disputes such as shareholder disagreements, bankruptcy matters, breaches of contracts, post-acquisition earnouts, divorces, embezzlement, or securities fraud, among others.
3. **Investigations and Dispute Resolution:** In cases of suspected financial misconduct or disputes, forensic accountants conduct thorough investigations to uncover evidence and provide clarity on financial matters. This may involve tracing funds, analyzing financial statements, reconstructing transactions, and quantifying damages.
4. **Regulatory Compliance:** Companies are subject to an increasing number of regulatory requirements, which vary depending on the industry and jurisdiction. Forensic accountants assist organizations in ensuring compliance with relevant regulations, such as the Sarbanes-Oxley Act (SOX), the False Claims Act, and the Anti-Kickback Statute, among others, by conducting compliance audits, assessing controls, and detecting potential financial and process irregularities.
5. **Risk Management:** Forensic accountants help organizations identify and mitigate financial risks by assessing internal controls, evaluating business processes, and implementing measures to prevent and detect fraud. Their expertise in financial analysis and fraud detection can help businesses anticipate and address potential risks before they escalate.

Unveiling the Core Functions: Investigation and Analysis

At the heart of forensic accounting lie two core functions: investigation and analysis. These functions are not just reactive responses to financial misconduct but proactive measures aimed at safeguarding the financial health of organizations and individuals alike.

Investigation

Forensic accountants utilize a variety of investigative techniques to uncover financial irregularities and

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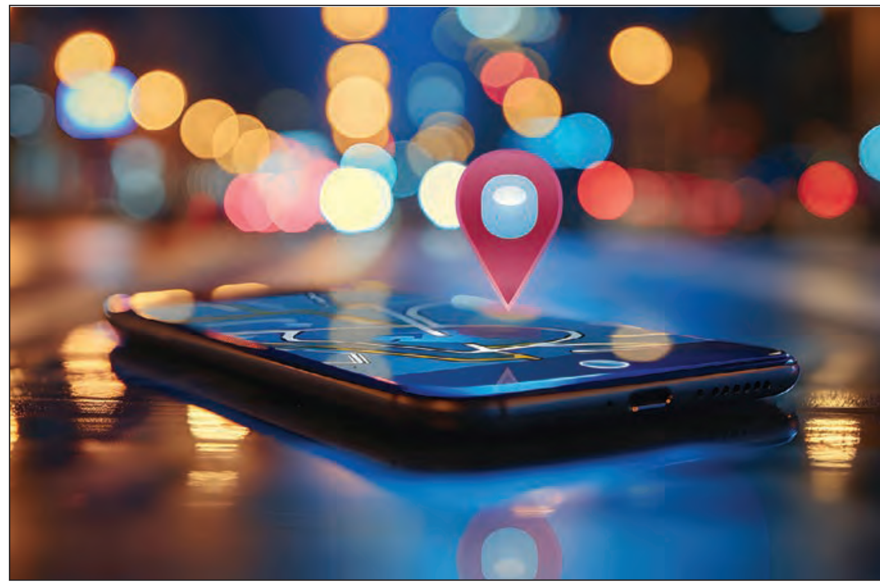
Avoiding the Data Villain Origin Story: Maintaining Your Status as An Electronic Discovery Hero

By Robert J. Draper
Relevant Data Technologies



As with any insurance claim, cell phone data can play an important evidentiary role in an insurance carrier making a coverage decision regarding a claim. As an example for purposes of this article, a fire claim in which the insured is the key suspect, cell phone data can create a timeline of events to assist with the investigation and establish clear and concise elements relating to the insured's whereabouts at the time of the loss. This information is critical as one of the three elements of an arson defense is that the insured had the opportunity to set the fire or have directed someone to set the fire.

During the investigation of an insurance claim, the carrier's options in obtaining the necessary cell phone data may be limited. Carriers can use the policy provisions requiring an insured to produce documents as reasonably requested to support a request for an insured's cell phone data. If the carrier needs to obtain cellular data, counsel should include in the demand for the insured's examination under oath ("EUO"), the following request:

> Please produce any and all cell or mobile phones you possess new or did possess at the time of loss at issue as well as the three months prior thereto, fully charged, and without deletion therefrom of any information, documents, videos, photos, texts, emails or other content from the date of the first loss at issue to the time of your Examinations Under Oath. Please save, protect and preserve the information and documents on your cell phones so that they may be examined at your Examinations Under Oath. Please provide any screen lock PIN codes.

At the EUO, a cell phone forensic engineer can download the data and review it to assist you in determining the insured's activities leading up to and including the date of the fire. Success largely depends on whether the insured voluntarily allows the engineer to download the data from his/her cell phone, If the insured refuses, the carrier should consider denying the claim based on the insured's failure to cooperate as required under the terms of the policy.

Realizing the potential incriminating evidence that could be obtained through his cell phone, an insured might "lose" his cell phone prior to an EUO or during a claim investigation. In that case, a carrier would need to obtain cell phone data, in particular cell tower coordinates, to identify the insured's locations. Cell phone providers, however, have taken the position that the cell tower data is the property of the provider, not the insured. As a result, an authorization executed by an insured will be insufficient to persuade a cell phone provider to release that information.

Depending on the applicable jurisdiction, there may be procedures authorizing pre-civil litigation discovery that may allow for the issuance of a subpoena for production of documents from a company. Other states may simply allow the insurance carrier to file suit directly against the cell phone company on the grounds that the company possesses relevant information in connection with an insurance claim and request that the court issue a

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By Lisa M. Powers
Rimkus Consulting Group

Injury consistency analysis is a complex type of analysis done in tandem with a biomechanical engineer and a legal nurse consultant (LNC). The LNC plays a crucial role in the analysis by defining complaints of injury that may have occurred during an incident and pre-existing conditions that may alter an individual's propensity to injury. By delving into the medical records, the LNC can provide evidence that may assist in assessing the feasibility of claims made. This is vital to guide the biomechanical expert to the motions, forces, and mechanisms required to induce the injuries diagnosed.

Injury consistency analysis is done by biomechanical engineers using Newton's Laws, other tools of physics, and engineering mechanics in conjunction with knowledge of human biology and physiology to define and explain an injury scenario (Ozkaya, Legar, Goldsheyder, & Margareta, 2017, pp. 5-6). This information is utilized to explain the mechanics associated with a particular condition in the context of an accidental event. Attorneys and insurance adjusters then use this analysis to determine if the injuries claimed were consistent with the mechanics of the incident. Incidents such as motor vehicle accidents (MVAs), slips/trips/falls, or worker's compensation injuries are common occurrences that can benefit from an injury consistency analysis.

Medical records contribute a vital component to injury consistency analysis. A targeted medical record summary for injury consistency analysis differs from the standard and usual medical record summary done by an LNC due to its specific focus on information needed for the biomechanical engineer. To assist in the analysis, special attention is paid to finding as much information as possible around the date of injury (DOI). It is important to find as much data as possible on pre-existing history, both medical and surgical, as well as hobbies, occupation, social history, and height/weight. Did the claimant have prior accidents or injuries that could explain the current stated complaints? Does the claimant have medical conditions that could contribute to the stated complaints, such as osteoarthritis, rheumatoid arthritis, or auto-immune conditions, etc.? These conditions can be used to explain stated complaints, if applicable. Also, any reports of the imaging completed can be important in the discovery of what is degenerative and what is acute. Is the intervertebral disc bulge, found on CT scan, consistent with the mechanisms of the noted accident? Does the claimant have an occupation that requires heavy lifting, such as work in construction or an oilfield? Is the claimant sedentary in their activities? Do they smoke? All of this information is taken into consideration when determining body conditioning prior to the incident and the possible incidence of degenerative changes versus acute changes.

Another element that affects injury analysis is the written account of the incident. Memories are tricky, fragmented, and complex things. Under stressful situations, recollections can change in even the most conscientious person. This makes the notation of the incident's description especially important. Many times, facts are forgotten or misremembered, misinterpreted, or fabricated. There are times when others add their own thoughts to the facts, changing the reality. As time passes, memories get less clear and imaginations can create an entirely different scenario. For this reason, it is especially important to make a word-for-word notation of what the claimant said during the first medical visit. This description is, more than likely, the most accurate, untainted by outside influences. Having medical records

Continued on page 72

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GDLA Held its 57th Annual Meeting at Ponte Vedra Inn & Club, June 13-16, 2024

A record number of GDLA members, sponsors, and other special guests gathered at Ponte Vedra Inn & Club in Florida for the 57th GDLA Annual Meeting from June 13-16, 2024. Events began on Thursday evening with the Welcome, Y'all! Reception sponsored by BAY Mediation & Arbitration Services. Friday and Saturday mornings were marked by CLE presentations as planned by program chair and (then) President-Elect Bill Casey. Friday evening was the President's Reception, sponsored by Veritext, honoring outgoing President Pamela Lee for her year of service. FORCON sponsored the closing reception and dinner. Collision Specialists, Inc. and ESi sponsored the hospitality bungalow.

During the Business Meeting on Saturday, GDLA members unanimously accepted the report of the Nominating Committee given by Immediate Past President Dart Meadows, electing the 2024-2025 officers and Board of Directors (see page 47). William T. "Bill" Casey, Jr., of Swift Currie McGhee & Hiers, Atlanta, took the reins as GDLA President. Other officers installed were President-Elect Ashley Rice of Waldon Adelman Castilla McNamara & Prout, Atlanta; Treasurer Martin A. "Marty" Levinson of Hawkins Parnell & Young, Atlanta; and Secretary Tracy O'Connell of Ellis Painter, Savannah. Jason D. Lewis of Chambless Higdon Richardson Katz & Griggs, Macon, was promoted to vice president and the following were elected to the Board of Directors: Jacob "Jake" E. Daly of Freeman Mathis & Gary, Atlanta; Beverly G. O'Hearn of Lueder Larkin & Hunter, Savannah; and Shepard R. "Shep" Smith of James Bates Brannan Groover, Athens. The officers were sworn-in by Cobb State Court Judge Diana Simmons.

President Pamela Lee presented the Distinguished Service Award, the highest accolade given by GDLA recognizing the recipient's extensive years of meritorious service, to Past President W. Melvin "Mel' Haas III of Constangy Brooks Smith & Prophete, Macon. President Lee presented Elissa B. Haynes of Freeman Mathis & Gary, Atlanta, with the President's Award for her many years of service chairing GDLA's Amicus Curiae Committee. Amicus Chair Emeritus Marty Levinson accepted the award on her behalf.

Also, during the Business Meeting, Treasurer Ashley Rice provided the financial report. Next, GDLA's Political Action Committee (PAC) President, Jake Daly, gave an overview of the prior legislative session. He also encouraged members to donate to GDLA's PAC so we can keep Kade Cullefer of Troutman Pepper Strategies working on our behalf under the Gold Dome.

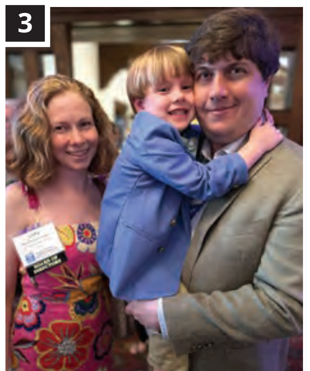
Lastly, DRI Regional Director Matt Lavisky of Butler Weihmuller Katz Craig in Tampa, Fla., updated attendees on DRI's work at the national level. He then presented outgoing President Lee with the DRI Exceptional Performance Award.

Pictured enjoying the Welcome, Y'all! Reception are: *1. Past President Jimmy Singer and his wife, Patti; Past President Warner Fox and his wife, Pat; Michaela and Scott Young of BAY Mediation, the evening's sponsor. 2. Past Presidents Walter McClelland (left) and Jerry Buchanan (right) with their wives, Kathy and Carolyn (center). 3. Michaela and Scott Young of BAY Mediation with VP Jason and Wendy Logan and their kids, Lilly and Jason, Jr. 4. Dana and Meg Braun. 5. Past President Kirby Mason with her daughters, Taylor and Alex, and husband, Frank. 6. Carrie Davis, Anne Gower, and Lia Melikian. 7. Visiting South Carolina Defense Trial Attorneys' Association President Mark Allison and Past President Staten Bitting. 8. Jonathan Spital, Matt Friedlander, Barbara Marschalk, and then-Secretary Marty Levinson. 9. Sarah Akinosho with BAY Mediation's Bill Allred. 10. Then-Treasurer Ashley Rice and her husband, Brandon. 11. Then-President-Elect Bill Casey with Walter Ballew. 12. Then-President Pamela Lee with her daughter, Addison. 13. VP Beth Boone and Sandie Cianflone.*

57th Annual Meeting: Educational Program

Scenes from the CLE program: *1. Cobb State Court Judge Diana Simmons discussed the importance of professionalism. 2. Maryland's DRI State Rep, John Sly, offered a primer on incorporating artificial intelligence (AI) and ChatGPT into the daily practice of law. 3. Anne Gower 4. Alex McDonald and 5. Lia Melikian explored navigating the minefield of time-limited demands (see article on page 24). 6. Lee Kynes and Matt Friedlander discussed defending claims for attorney's fees under O.C.G.A. § 9-11-68. 7. Rob Draper with GDLA Platinum Sponsor Relevant Data discussed e-discovery with respect to cell phones (see article on page 36). 8. Stephen Roper with GDLA Platinum Sponsor DigiStream Investigations gave real case examples of using Open Source Intelligence (OSINT) to help during the investigative stage of a lawsuit. 9. Hillary Shawkat and Beverly O'Hearn visit between speakers. 10. Shep Smith and Jason Lewis. 11. Then-President-Elect Bill Casey introduces the CLE program that he planned.*

57th Annual Meeting: President's Reception



Pictured enjoying the President's Reception on Friday evening are: *1. Then-President Pamela Lee with GDLA Platinum Sponsor Veritext's reps–Jennifer Pierson, Lauren Berry, and Hayley Miller–who sponsored the evening. 2. Rebecca and Cody McCollum, Chris Perniciaro, and Morgan Schroeder. 3. Libby Watkins with her husband, Tom, and son, T.J. 4. Helen and Lee Kynes, Matt Friedlander, and Deena and Jonathan Spital. 5. Past President Mel Haas (left) and his wife, Linda, with Jonathan Martin (right) and his wife, Beth. 6. Sean Herald with his newborn, Thomas, and wife, Reagan, visit with Sarah Lisle and her husband, Kenny, and kids, Camila Rose and Hunter. 7. Past Presidents: Dave Nelson, Mel Haas, Kirby Mason, Walter McClelland, and Peter Muller. 8. Ben Harbin with his wife, Alex, and newborn, Matthew.*

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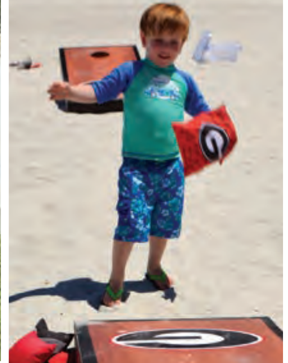
57th Annual Meeting: Business Meeting & Awards

Scenes from the Business Meeting on Saturday: *1. President Pamela Lee presented Mel Haas (right) with the Distinguished Service Award, GDLA's highest honor. Mel is joined by his wife, Linda. 2. Immediate Past President Dart Meadows presented the Nominating Committee report, after which those listed on page 47 were elected to the Board of Directors. 3. GDLA PAC President Jake Daly gave an update on the 2024 Legislative Session and encouraged members to donate to the PAC so we can keep our lobbyist, Troutman Strategies' Kade Cullefer, working for us under the Gold Dome. 4. Immediate Past President Dart Meadows presented outgoing President Pamela Lee with the commemorative crystal gavel. 5. Treasurer Ashley Rice gave the financial report. 6. DRI Regional Director (right) presented President Pamela Lee with the DRI Exceptional Performance Award. 7. GDLA's 2024-2025 officers sworn in by Judge Diana Simmons are: (l-r) Secretary Tracy O'Connell, Treasurer Marty Levinson, President-Elect Ashley Rice, and President Bill Casey..*

57th Annual Meeting: Fun in the Sun



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Each year, two of GDLA's Platinum Sponsors, ESi and Collision Specialists Inc. (CSI), team up to stock a hospitality bungalow with food and snacks to make beach days more fun. It also gives everyone a place to beat the heat before and after the annual cornhole tournament. Pictured are: 1. Bea Hancock, Bryant and Katie Harden with ESi's reps, Heather Slatton and Tony Dill. 2. Brandon and Ashley Rice with CSI's Connor and Dylan Murphy and their newborn, Maggie.

57th Annual Meeting: Closing Reception & Dinner

Pictured on the final night are: *1. Past President Staten Bitting and his wife, Cindy, with FORCON's Bryan Hubert and his wife, Shannon. FORCON sponsored the evening. 2. DRI Regional Director Matt Lavisky and Secretary Tracy O'Connell. 3. (l-r) Travis Hall with his kids, Isabel, Jon Emory, and Siler, and his wife, Ivey. 4. Brandon and President-Elect Ashley Rice, Lauren and Shep Smith, Alex and Ben Harbin. 5. VP Joe Stephens (right) with his wife, Christina, and kids, David, Luke, and Anna Jane. 6. Lindsay Ferguson (right) and her husband, John. 7. (center) Past President Dart Meadows and his wife, Carol, with Frank Bedinger (right) and his wife, Megan. 8. Katie Harden (left) and her husband, Bryant (right), with (middle) Nicholas and Krysta Grymes, and Bea and Josh Hancock. 9. Elliott Ream with Judge Diana Simmons. 10. VP Jason Logan (left) and his wife, Wendy, with Jonathan Martin (right) and his wife, Beth.*

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The Executive Committee (EC) is composed of the officers and three most recent past presidents. This year is an exception in the wake of the passing of George Hall and Jeff Ward.

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President's Message

Continued from page 5

sider donating personally or asking your firm to contribute to GDLA's PAC to enhance our leverage under the Gold Dome. Page 27 lists GDLA member firms who have donated to the PAC. We would like to be able to include your firm when we list our supporting firms in the next issue.

Cody McCollum, Young Lawyers Section Chair, is launching a GDLA mentorship program so look for an eblast announcement soon. The YLS will offer young members the opportunity to lunch with more experienced members to talk about the practice of law in general and, if requested, offer advice on navigating the difficulties confronted by young defense lawyers. We expect the program to illustrate the usefulness of active participation in GDLA. Worry not—each mentor must agree not to solicit mentees for employment!

You may recall in prior years we held joint events with GTLA—from a judicial candidates' forum to networking happy hours to the GDLA-GTLA Civility & Professionalism Award and accompanying reception with the appellate bench—all scuttled by the pandemic. We invited GTLA to relaunch the joint award so look for information on nominating a GTLA member who demonstrates the highest ideals of civility and professionalism. In turn, GTLA members will nominate and select a deserving GDLA member. The inaugural award winners were GDLA's Michael Rust and Philip Henry for GTLA. The next award will be presented at a joint gathering in 2025.

One of my favorite coaches used to say, "There's three kinds of people: those who make stuff happen; those who watch stuff happen; and those who ask what the heck just happened." I want us to make stuff happen. Thank you for your membership and support of GDLA.

For the Defense,

William T. "Bill" Casey, Jr.
Swift Currie McGhee & Hiers, Atlanta

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Time-Limited Demands

Continued from page 24

The revised version of O.C.G.A. § 9-11-67.1 went into effect July 1, 2021, as a response to *Woodard* and the subsequent increased use of new "gotcha" tactics from claimants' attorneys. Subsequent case law chipped away at the revised statute once again, leading to the newly enacted O.C.G.A. § 9-11-67.1. See *de Paz v. de Pineda*, 361 Ga. App. 293, 295-296 (2021)(holding that "[i]f the recipient to a pre-suit offer fails to perform the act required to accept the offer, then the parties do not have a meeting of the minds."); see also *Bennett v. Novas*, 364 Ga. App. 364, 365, 376 (2022)(a request stating, "[c]ould you please clarify if [named insured] can also be named on the limited liability release?" was construed as a counteroffer even though couched in clarification language since the parties to be released were clearly stated in the demand).

II. Newly-Enacted O.C.G.A. § 9-11-67.1

For the second time in the past three years, Georgia has amended O.C.G.A. § 9-11-67.1. Senate Bill 83 was signed into law by Governor Brian Kemp on April 22, 2024, and became effective immediately upon signing.

This widely used statute was originally enacted in 2013 to address tactics that proliferated in the aftermath of *Holt* and its progeny. The 2021 changes to the statute attempted to address the increase in "gotcha" demands, but claimants' attorneys continued to develop strategies to make time-limited demands difficult to accept. The 2024 amendments rework the statute significantly to address the tactics and appellate decisions that have made "set up" demands an intractable norm.

A. Applicability & Scope

As with the 2021 amendments, the 2024 amendments attempt to expand the applicability of O.C.G.A. § 9-11-67.1. The original version of the statute applied to offers to settle presuit claims. See O.C.G.A. § 9-11-67.1(a)(2013). This led to claimants' attorneys filling suit, not notifying the carrier suit was filed, and sending a 10-day demand with the expectation that the carrier would assume they had the 30 days allowed under the statute to respond to a presuit settlement offer and fail to respond timely. In response, the 2021 amendment extended the scope of the statute to cover pre-suit claims and claims in suit until the filing of an answer. See O.C.G.A. § 9-11-67.1(a)(2013). As before, claimants' attorneys found a chink in the armor: they began to take advantage of situations in which another party, like the UM carrier, had filed an answer, but the carrier to which the demand was sent had not yet responded. Thus, we get the 2024 amendments expanding the scope further to apply "[f]rom the time a cause of action accrues until the filing of an answer by the named defendant, or if there are multiple named defendants, until the time that all named defendants have filed their initial answers or been found to be in default, whichever is applicable." O.C.G.A. § 9-11-67.1(b).

B. Bilateral Contract

The 2024 version of the Code section begins by stating that "[a]ny offer to settle a tort claim for personal injury, bodily injury, or death arising from a motor vehicle collision shall be an offer to enter into a ***bilateral contract***. O.C.G.A. § 9-11-67.1(a) (emphasis added). In *Woodard*, the Georgia Supreme Court held that the 2021 version of O.C.G.A. § 9-11-67.1 permitted unilateral contracts, whereby an offeror "may demand acceptance in the form of performance… before there is a binding enforceable settlement contract." *Woodard*, 300 Ga. at 823. The addition of "bilateral contract" language in the Code section appears to be in direct response to the case law, disallowing "unilateral contract" demands and eliminating the need for specific acts to create a binding settlement agreement. Instead, it seems the 2024 amendments aim for notice of acceptance to be sufficient for a settlement agreement to form. See O.C.G.A. § 9-11-67.1(d).

C. Material Terms

The 2024 amendments also tweak the material terms that the offeror must include in the offer and add that those terms "shall be the only material terms." O.C.G.A. § 9-11-67.1(b)(1). Those terms are predominantly the same as the 2021 version of the statute with a couple notable changes.

The first notable change is the use of "a date by" instead of "the time period within" which an offer must be accepted, still allowing at least 30 days from receipt of the offer. O.C.G.A. § 9-11-67.1(b)(1)(A). Next, the statute also adds payment deadline to the material terms and mandates the inclusion of "a date by" which payment must be received, as well as "a date by" which the carrier affidavit must be received, both requiring no less than 40 days from receipt of the offer. O.C.G.A. § 9-11-67.1 (b)(1)(F)-(G).

This change is presumably in response to claimants' attorneys including easily misconstrued language in time-limited demands requiring that payment be delivered on a certain day, and not sooner. The most prominent example is in *Pierce v. Banks*, 368 Ga. App. 496, 501 (2023), where the Court of Appeals evaluated whether a settlement agreement existed under the original version of O.C.G.A. § 9-11-67.1, which stated payment could be required "within a specified period of time" as long as such period was not less than 10 days. O.C.G.A. § 9-11-67.1(g)(2013). In *Pierce*, the Court of Appeals rejected the argument that demanding payment on "15th day after acceptance" was not the same as "requiring payment within a specified period," reasoning that

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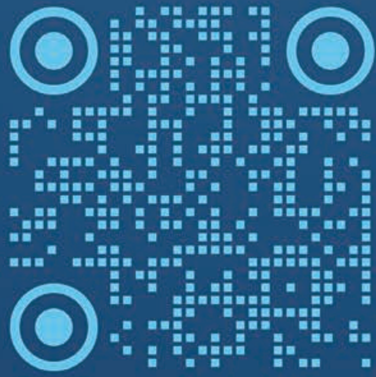

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"[a] day *is* a period of time—it is a span of 24 hours." *Pierce*, 368 Ga. at 501 (emphasis in original). The hope, it seems, is that by requiring the offeror to include "a date by" which acceptance, payment, and carrier affidavit must be provided, it will prevent claimants' attorneys from specifying a single day (or an even smaller window of time) for delivery of these items and will allow insurance carriers to provide them earlier than the specified date without such early delivery being construed as a counteroffer.

Subsection (c) of the amended Code Section reaffirms the only material terms in the Code section are those listed in (b)(1), and further elaborates that the parties may agree to other terms, but those terms will be construed as immaterial and any failure to comply with said immaterial terms will not result in a civil action arising from a failure to settle claim. O.C.G.A. § 9-11-67.1(c).

D. "Safe Harbor" Provision

The new Subsection (i)(1) of the amended statute attempts to add a "safe harbor" provision that the recipient cannot be subject to a "civil action arising from an alleged failure by the recipient to settle a tort claim" where the recipient provides: (1) "[a] writing that purports to accept…the material terms…with the exception of the amount of payment"; (2) a carrier affidavit, if requested; and (3) payment of the amount demanded, or the available bodily injury liability policy limit, whichever is less. O.C.G.A. § 9-11-67.1(i)(1).

The 2024 amendments also make clear that terms in addition to those allowed by (b)(1) may be included by the offeror and agreed to by the recipient, but that such terms are "immaterial terms" and that "variance by the recipient from such immaterial term shall not subject the recipient to a civil action arising from an alleged failure by the recipient to accept an offer to settle" as long as the recipient complies with the new "safe harbor" provision in Subsection (i). O.C.G.A. § 9-11-67.1(c) and (i).

These additions have the potential to provide significant protection for insurance carriers, allowing them to sidestep any immaterial terms by accepting and sending payment and carrier affidavit (if applicable) to insulate themselves from litigation arising out of a purported failure to settle claims.

E. Other Additions

Subsection (i)(2) addresses offers of settlement that do not cite to the Code section, clarifying that the Code section is applicable "even where such offer expressly provides that any or all of this Code section does not apply to such offer." O.C.G.A. § 9-11-67.1(i)(2). Subsection (e) keeps the language that the parties are free to reach a settlement agreement in a manner that is agreeable to both offeror and recipient, except that "no party shall require another party, as a condition of settlement, to waive or modify the application of this Code section or any provision of this Code Section." O.C.G.A. § 9-11-67.1(e). These additions should, in theory, allow insurance carriers to rely on the Code section even when faced with a non-statutory demand that requests waiver of the statute and includes additional material terms that are erroneous, incoherent, or fraught with inconsistencies. See, e.g., *Redfearn v. Moore et al.*, No. A24A1028, 2024 Ga. App. LEXIS 199 (Ga. App. May 23, 2024)(demand requiring waiver of the applicability of the statute and including material terms outside of the scope of the 2021 version of O.C.G.A. § 9-11-67.1).

While the 2024 amendments to O.C.G.A. § 9-11-67.1 introduce several changes aimed at curtailing "gotcha" settlement demands, their practical effectiveness remains to be seen. As with the 2021 amendments, we expect claimants' attorneys will develop new tactics to maintain the chaotic status quo of exposure and unpredictability for insurance carriers and attorneys responding to settlement demands.

III. Trends in Time-Limited Demands

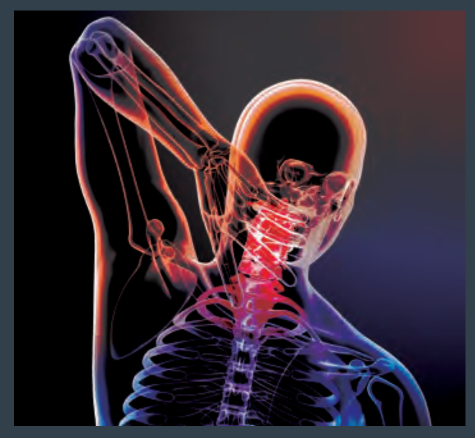
As we have seen in the past, claimants' attorneys will undoubtedly find ways to challenge the meaning and applicability of the newly enacted O.C.G.A. § 9-11-67.1.

A. The Civil Practice Act (CPA) Argument

Claimants' attorneys are now arguing that O.C.G.A. § 9-11-67.1 is part of the Civil Practice Act (CPA), making it inapplicable to pre-suit matters and only applicable to matters where suit has been filed. Thus, claimants' attorneys contend Code section 9-11-67.1 is applicable only in the narrow window of time after a complaint is filed but before a defendant has answered.

This CPA argument relies on the Code section as well as Georgia common law. O.C.G.A. § 9-11-1 defines the scope of Title 9, Chapter 11 as "govern[ing] the procedure in all courts of record of this state in all actions of civil nature", O.C.G.A. § 9-11-2 states "[t]here shall be one form of action, to be known as a 'civil action'". Likewise, O.C.G.A. § 9-11-3(a) states that "[a] civil action is commenced by filing a complaint with the court." Essentially, claimants' attorneys contend that O.C.G.A. § 9-11-67.1 does not apply to any pre-suit demands whatsoever. The CPA argument asserts the Code limits the scope of O.C.G.A. § 9-11-67.1 only to matters after a complaint is filed in a court of record, and that, by including O.C.G.A. § 9-11-67.1 as part of the CPA, the legislature limited the scope of the statute to only matters that are in suit.

The CPA argument cites *Jersawitz v. Hicks*, 264 Ga. 553 (1994) for the contention that "when the language of a statute is unambiguous, the court has no authority to imply a contrary intent. Neither should subtle or



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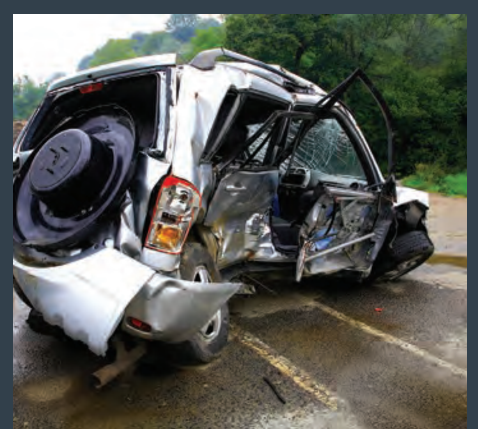

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forced constructions of the statute be used to limit or extend its scope." *Id.* The argument continues by pointing out that the language of O.C.G.A. § 9-11-67.1 further limits the application of the statute to offers to settle made prior to the filing of an answer.

While these time-limited demands also tend to state that they are made "consistent with" O.C.G.A. § 9-11-67.1, the demands specify they are not made "pursuant to" O.C.G.A. § 9-11-67.1 and, therefore, are not controlled by the statute.

This argument, if successful, would render the recent changes to O.C.G.A. § 9-11-67.1 irrelevant for all pre-suit settlement offers.

B. Tactics to Get Information from the Insured

Another increasingly common tactic is requiring an affidavit of no other coverage, a financial affidavit, and/or recorded statement from the insured to avoid a lawsuit aimed solely at discovering any additional assets or insurance coverage for the loss. Most of these demands are careful not to make the affidavit or recorded statement a "material term," but suggest that the affidavit or recorded statement is required to avoid a lawsuit for the sole purpose of confirming no other coverage through discovery. This is an effective strategy since the insurance carrier and defense counsel for the insured are both inclined to provide a pre-suit statement to avoid a lawsuit.

Other demands require the insurance carrier to speak with the insured driver to confirm no other coverage exists and that the insured driver was not in the course and scope of any employment at the time of loss. The insurance carrier must then attest to this in the carrier affidavit per O.C.G.A. § 9-11-67.1(b)(1)(G). This serves as a proxy for an affidavit from the insured driver and poses a compliance issue if the insurance carrier cannot reach the driver.

Some claimants' attorneys have been using the disclosure statute O.C.G.A. § 33-3-28 (2022) in an attempt to secure affidavits from insureds prior to even submitting a time-limited demand, sometimes sending the disclosure request directly to the insured. The statute states, in pertinent part, that "the insured, within 30 days of receiving a written request from a claimant or the claimant's attorney, shall disclose to the claimant or his attorney the name of each known insurer which may be liable to the claimant upon such claim." *Id.* at (a)(2). Others will cite O.C.G.A. § 33-3-28 in the demand when asking for a sworn affidavit from the insured. This practice leverages the statutory requirement to extract coverage information from an insured, complicating compliance with the disclosure requirements and underscoring the need for carriers to be vigilant in responding to disclosure requests and communicating with the insured.

C. "Mirror Image" Acceptance

Georgia appellate courts consistently uphold the "mirror image" rule, requiring demand responses to be identical to the demand terms to form an enforceable agreement. This has motivated another trend in time-limited demands, namely to include terms that are easily misconstrued or present significant compliance challenges. *See, e.g., Woodard* at 852; *Pierce* at 500; *Patrick et al. v. Kingston*, 370 Ga. App. 570, 576 (2024).

One such term is the prohibition of "any terms, conditions, descriptions, expirations, or restrictions" on the settlement check or any other document sent by the insurance carrier. See Redfearn v. Moore et al., No. A24A1028, 2024 Ga. App. LEXIS 199 at *6 (Ga. App. May 23, 2024). This language can mean that the check cannot have any sort of expiration, as we saw in *Pierce* and *Kingston*. See *Pierce* at 498; see also *Kingston* at 577. Similar or more explicit language can also mean that the settlement check may not include "claim number, named insured, and date of loss" or any other information not explicitly permitted by the demand. See *Redfearn* at *3. Many carriers have already removed the expiration and may need to remove all other identifying information from their checks. Or, as the Court of Appeals has repeatedly suggested, insurance carriers can elect a different payment method that is capable of satisfying the terms of the offer. See Pierce at 502; accord *Kingston* at 565-566 and *Redfearn* at *8.

Another term requires that payment be delivered on a specific day by omitting the word "within" when setting the time period for payment. See Pierce at 499 (payment had to be received 15 days after, rather than within 15 days, of the insurance carrier's written acceptance of the offer, but was received prior to the 15th day, resulting in an invalid acceptance); *see also Redfearn* at *1-2 (the demand stated that "payment must be received 41 days after [carrier]'s receipt of th[e] Offer" but payment was instead delivered on the 8th day, also resulting in an invalid acceptance). O.C.G.A. § 9-11-67.1 tries to address this with the inclusion of "a date by" which acceptance, payment, and carrier affidavit are due, allowing delivery up to and including that date.

A similarly easy-to-miss term requests acceptance pursuant to O.C.G.A. § 9-11-67.1(a) without any explicit mention of a statement under oath or affidavit from the insurance carrier. The hope is that the insurance carrier, knowing that the affidavit is optional, will neglect to provide the affidavit, thus running afoul of the designated material terms under the new Code section and manufacturing a negligent or bad faith failure to settle claim.

As we saw in *Redfearn*, another tactic is to require an explicit waiver of the applicability of O.C.G.A. § 9-11-67.1 in the demand acceptance. See id. at *9, n.6. While the Court of Appeals in *Redfearn* did not address

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the validity of this request in its decision, the oral arguments suggested that, if defense counsel was confident in the applicability of O.C.G.A. § 9-11-67.1, it would have accepted only the material terms as required by the statute, and not complied with the non-material terms like the waiver of the statute.[1] The 2024 amendment to O.C.G.A. § 9-11-67.1 attempts to address this very issue in Subsection (i)(2).

Lastly, claimants' attorneys will use subtle language suggesting that the demand response must come directly from the carrier, rather than counsel retained to represent the insured. For example, the demand might say that the insurance carrier (or another authorized payor) must expressly accept the offer in writing. In these instances, the demand response may need to come directly from the carrier or from in-house counsel, and not from outside counsel.

IV. Georgia Courts

A. Nuclear Verdicts

Georgia has seen a drastic increase in nuclear verdicts ($10 million+), earning it the top spot in the country on the American Tort Reform Foundation's Judicial Hellholes® list,[2] highlighting a concerning trend for insureds and insurance carriers. This increase has acted to compound the dangers associated with negligent or bad faith failure to settle claims, creating even greater risk of financial exposure to insurance carriers for any mistake.

As nuclear verdicts become more prevalent, both insureds and insurers face an increasingly precarious legal landscape, where claimants' attorneys are incentivized to manufacture demand rejections to elicit extra-contractual exposure and even the best possible efforts to settle are insufficient to form binding settlement agreements.

B. Upholding the "Mirror Image" Rule

Georgia appellate courts consistently uphold the "mirror image" rule of contract formation, holding the statute does not override common law contract formation. The mirror image rule requires the demand response to be identical to the demand terms in order to form an enforceable agreement. In *Woodard*, the Georgia Supreme Court ingrained the common law principles that "an offeror is the master of his or her offer, free to set the terms" and "there is only a binding settlement agreement if the offer is "accepted unequivocally and without variance of any sort." *Woodard*, 797 S.E.2d at 819. Ever since, Georgia courts have vehemently upheld these common law principles even after the enactment of O.C.G.A. § 9-11-67.1.

> *... claimants' attorneys will use subtle language suggesting that the demand response must come directly from the carrier, rather than counsel retained to represent the insured.*

This heavy-handed enforcement of the "mirror image" rule has created an environment where claimants' attorneys are motivated to include new and increasingly complicated requirements in their time-limited demands to cynically manufacture negligent or bad faith failure to settle claims against the insurance carrier.

In the recent case *Pierce v. Banks*, 368 Ga. App. 496 (2023), the Court of Appeals examined a question of contract formation under the 2021 version of O.C.G.A. § 9-11-67.1. The Court of Appeals considered several issues with the carrier's demand acceptance, including a missing comma on the check, but only ruled on two of the issues presented. The first issue was that the settlement check was delivered too early. The demand stated that payment was to "'be received 15 days after Trexis' written acceptance of th[e] offer." *Id.* at 497. The check was delivered to the attorney before the 15th day. The second issue was that the check contained a "void after 180 days" provision when the demand stated that payment "must not include any terms, conditions, descriptions, *expirations*, or restrictions that are not expressly permitted in this offer." *Id.* (emphasis added). The Court of Appeals reasoned that nothing prevented delivery of payment on the 15th day and the carrier "could have chosen a number of other means to provide payment to Appellant, … yet elected a payment method that… could not have satisfied the terms of the offer." *Id.* at 502. The Court of Appeals went on to reassert that "'[i]f a [party] fails to deliver payment in the manner specified in the offer, then [that party] did not accept the offer.'..". *de Paz v. de Pineda*, 361 Ga. App. 293, 295-296 (2021). The Court of Appeals ultimately held there was no mirror image acceptance of the demand terms and the parties did not have a binding settlement agreement.

In the even more recent case of *Redfearn v. Moore* et al., No. A24A1028, 2024 Ga. App. LEXIS 199 (Ga. App. May 23, 2024), the Court of Appeals was presented with several alleged deficiencies in acceptance of a demand under the 2021 version of O.C.G.A. § 9-11-67.1, but only addressed the deficiency in payment. *See id.* at *9. The Court of Appeals again concluded that "State Farm, on behalf of Defendant, did not have to provide payment in the form of check; it could have chosen another form of payment as specified by subsection (f) in order to comply with subsection (a)." *Id.* at *8-9.

In *Redfearn*, we see the CPA argument starting to come into play, but the appellate court declined to ad-

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dress that argument in its decision. *Id.* at *1-2, n.2. The demand required that the carrier waive the applicability of O.C.G.A. § 9-11-67.1 in the acceptance, so the acceptance letter stated "State Farm agrees that any inconsistencies between [Plaintiffs'] Offer and OCGA § 9-11-67.1 do not invalidate [Plaintiffs'] Offer and the terms, conditions and acts required by [Plaintiffs'] Offer are controlled by [Plaintiffs'] Offer and not by OCGA § 9-11-67.1." *Id.* at n.2.

In a footnote, the Court of Appeals in *Redfearn* further expanded a claimant's ability to include any desired material terms by stating "nothing in our opinion should be construed as requiring a plaintiff to always assert a reason for why an offer required a specific act to be performed or prohibited a certain condition or restriction," insinuating that no rationale is needed for even the most absurd terms to be material. *Id.* at *9-10 n.6,

These recent rulings, in conjunction with constantly increasing nuclear verdicts across the state, combine to create a very dangerous cocktail where the smallest variation in a demand response can lead to a negligent or bad faith failure to settle claim that may end up costing a carrier millions in extra-contractual funds.

V. Recommendations

Given these recent trends and case law, the best course of action may be to comply with all the express terms of the time-limited demand, whether material or immaterial, unless and until there is favorable case law interpreting the newly enacted O.C.G.A. § 9-11-67.1. Alternatively, if it is clear that the conditions of the demand cannot be met, it may be best to cite the Code section and accept only the material terms under Subsection (b)(1).

Here are some recommendations for best practices when handling demands:

- A. **Releases:** When necessary, provide a one-paragraph limited release with no cite to O.C.G.A. § 33-24-41.1, no notary, no blank for date of signing, and no language that is not explicitly requested in the demand.
- B. **Payment Method:** If the carrier is unable to issue a check or draft in compliance with demand terms without any additional language, choose an alternate method of payment.
- C. **Delivering Funds:** If payment is required on a specific date, rather than within a period of time, deliver funds on that specific date. If funds are required on a weekend and the carrier is issuing check or draft, request clarification as to what hours someone will be present to accept the funds.
- D. **Track Demand Language:** Track demand language in acceptance, release, payment, and affidavit(s) exactly, including punctuation.
- E **Insured Affidavit:** If an affidavit is required from the insured, take all necessary steps to secure and provide it, including hiring a private investigator.
- F. **Carrier Affidavit:** Include affidavit from the carrier with every demand response, unless explicitly prohibited by the demand terms. Note that it may need to be called a "Statement Under Oath," rather than "Affidavit," depending on demand language.
- G. **Affidavit of Recipient:** If demand is asking for affidavit from the "recipient of the offer" and the offer is addressed to defense counsel, defense counsel may also need to provide an affidavit.
- H. **Clarification:** Avoid clarification questions on parties to be released, unless demand does not specify release of driver/tortfeasor.
- I. **Liens:** Avoid seeking assurances that liens will be satisfied. Unless precluded by the demand, you may send liens or lien notices to attorney for their file after acceptance has been sent. Claimants' attorneys have an ethical obligation to satisfy known liens,[3] so putting the attorney on notice is sufficient.

The recent amendments to O.C.G.A. § 9-11-67.1 reflect ongoing legislative efforts to mitigate manipulative tactics seen in Georgia time-limited demands. While the attempted shift to bilateral contracts and the inclusion of the new safe harbor provision may offer some relief, the effectiveness of these amendments in curtailing "gotcha" tactics remains to be fully seen in practice. Until we see how Georgia appellate courts will interpret the 2024 amendments to O.C.G.A. § 9-11-67.1, defense counsel will have to continue to navigate the minefield of time-limited demands with careful attention to detail and proactive strategies to adapt to ever-evolving tactics from the other side.

Lia Melikian is a partner at Gower Wooten & Darneille in Atlanta, where the majority of her practice involves non-standard carriers and assisting in the resolution of time demands and facilitation of pre-litigation settlements.

Endnotes

1 Oral Argument at 18:12, *Redfearn v. Moore et al.*, No. A24A1028, 2024 Ga. App. LEXIS 199 (Ga. App. May 23, 2024), available at https://www.gaappeals.us/oral-arguments/oral-argument-video-archive.

2 See Georgia Grabs Unwanted Crown as America's Top Judicial Hellhole®, AMERICAN TORT REFORM ASSOCIATION, https://www.atra.org/2023/12/05/georgia-grabs-unwanted-crown-as-americas-top-judicial-hellhole/ (last visited June 2, 2024).

3 GA. R. PROF. COND. RULE 1.15 (I)(2024).

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Mr. Shryock has a wide breadth of experience in forensic accounting for insurance and construction-related matters. He has testified at arbitration, in Federal Court and in State Court. He has also been deposed on numerous occasions and has participated in multiple meditations and other claims settlement negotiations. He has been named as an expert in matters related to business interruption/lost profits, construction costs and related change order documentation, financial condition and motive in alleged arson claims, business valuation issues, and business inventory losses due to fire.

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Mediation Confidentiality

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system, the State Bar included the Georgia Uniform Mediation Act in its 2019 and 2021 legislative package, which became law on July 1, 2021. *(O.C.G.A. § 9-17-1, et. seq.)*. This legislation further strengthened confidentiality by allowing a mediator to refuse to disclose mediation communications and to prevent any other person from disclosing such communications. The adoption of these rules and statutes not only encourages settlement negotiations, as outlined in *O.C.G.A. § 24-4-408 and Fed. R. Evid. Rule 408*, but also provides a strong incentive for utilizing the unique opportunity presented by the opening joint session.

Self-Determination

The Georgia Commission on Dispute Resolution defined mediation as "a process in which a mediator facilitates settlement discussions between parties." The rules further articulated that [t]he mediator has no authority to decide or impose a settlement upon the parties. The mediator attempts to focus the attention on the parties upon their needs and interests rather than upon rights and positions, [. . . and] [a]ny settlement is entirely voluntary. In the absence of settlement, the parties lose none of their rights to a jury trial." Model Court Mediation Rules, Rule 1, Definitions. (Amended March 29, 2021)

Similarly, O.C.G.A. §9-17-1 defines mediation, "[as] a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a *voluntary agreement* regarding their dispute." (emphasis added) Id. Further, "'Mediation party' means a person that participates in a mediation and whose *agreement* is necessary to resolve the dispute." (emphasis added) *Id*. Thus, each party at the mediation determines whether the matter settles, and the terms of the settlement—i.e., self-determination.

The robust confidentiality protections and clear mandate for self-determination in mediation enable practitioners to use the opening mediation statement as a strategic tool to achieve favorable outcomes. But effective utilization of the opening mediation statement requires planning and continuous assessment.

Effectively Using the Joint Session in Mediation

The joint mediation session, especially the initial presentation by the parties, is a pivotal moment that sets the stage for a successful settlement. This session, protected by confidentiality, offers a unique opportunity to build a foundation for negotiations. However, many parties and their counsel often skip opening statements, diving straight into negotiations. While in some cases this approach might be suitable, particularly when significant discovery and motions have already occurred, the joint session generally presents an invaluable opportunity that should not be overlooked.

The Importance of the Joint Session

1. Direct Communication:

- The joint session allows counsel to speak directly to the opposing party, without counsel's filter. This direct line of communication can help humanize the parties and facilitate understanding.

2. Emotional Context:

- Litigation often involves strong emotions. The joint session provides a platform to address these emotions constructively, which is crucial for resolving the underlying issues and moving towards a settlement.

3. Creating a Narrative:

- Counsel can use the joint session to create a narrative that frames the dispute in a way that encourages effective negotiations.
- However, relay enough information directly to convey command of the facts and the ability to effectively present the case to the jury.

Strategies for an Effective Opening Mediation Statement

1. Express Empathy and Establish Rapport:

- Counsel should demonstrate genuine empathy towards the opposing party. Begin by acknowledging the emotions involved in the dispute. Show empathy and understanding to build rapport with the opposing party.
- This helps lower defenses and build a foundation for ongoing dialogue and shows a commitment to the mediation process.

2. Focusing on Interests and Needs:

- Shift the focus from positions and the merits to underlying interests and needs. Highlight common interests and suggest ways to address them that could satisfy both parties.

3. Balancing Advocacy and Diplomacy:

- Present the merits of your case clearly but avoid being confrontational. Advocacy should be balanced with diplomacy to avoid creating further barriers to negotiation.

4. Convey Case Merits Appropriately:

- Thorough preparation is essential. Understand the facts of the case, the interests and needs of both parties, and the potential areas for compromise.
- While it is important to present the strengths of your case, this should be done without being argumentative or overly aggressive.
- Similarly, acknowledge the obvious merits of the case. The goal is to persuade the oppos-

ing party to compromise, not to alienate them.
- Develop a clear narrative that addresses these elements.

5. Avoid Bravado:
- Overconfidence and bravado can offend the opposing party and create barriers to compromise. An effective opening should be confident yet respectful and considerate of the other party's perspective.

6. Setting a Positive Tone:
- Use the opening statement to set a collaborative tone. Emphasize the goal of reaching a mutually satisfactory resolution and the benefits of a negotiated settlement over prolonged litigation.

7. Demonstrate Commitment:
- Express a genuine commitment to the mediation process. Reinforce the idea that mediation is a collaborative effort aimed at finding a solution that works for everyone involved.
- The party or representative should also express a sincere commitment to the mediation process with warmth and compassion. This attitude can further foster a cooperative atmosphere.

8. Ongoing Assessment:
- Continuously assess the dynamics of the mediation. Be prepared to adapt your approach based on the responses and attitudes of the opposing party.

Conclusion

The primary goal of mediation is to reach a settlement. To achieve this, it is essential to use the joint session effectively by laying a solid foundation for negotiation and encouraging the parties to collaboratively reach an amicable resolution. The opening mediation statement is a powerful tool for shaping the mediation process and achieving favorable outcomes. This requires empathetic communication, a genuine commitment to the process, and a balanced presentation of the case's merits. By leveraging the confidentiality and self-determination inherent in mediation, practitioners can use the opening mediation statement to establish a sturdy foundation for effective negotiations. With careful planning and a balanced approach, practitioners can maximize the potential for a successful resolution. ◆

After 35 years in litigation, Charles M. "Charlie" McDaniel, Jr. transitioned his focus exclusively to mediation, where he is a neutral at BAY Mediation & Arbitration Services, a GDLA Platinum Sponsor. He leverages his extensive knowledge and skills to guide parties toward negotiated resolutions, recognizing the common ground that often underlies disputes, He is committed to facilitating constructive dialogue and achieving mutually beneficial outcomes.

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Fire Investigations

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accident site (e.g., operating and maintenance procedures, emergency shutdown procedures, and employee training), the possession of appropriate environmental permits, whether prior environmental violations may have predicted negative outcomes, and expectations of the presence and type of contamination that may be part of fire effluents.[7]

Environmental Impacts of Industrial Fires

The initial source of environmental impacts from industrial fires are the products of combustion that are dispersed into the air, which then may be deposited on the ground below the smoke plume. Impacts of fire suppression by first responders are largely aquatic and terrestrial, with firefighting water ("firewater") runoff carrying fire products and suppression agents (including chemical additives) into waterways or groundwater, or directly into the soil.

The interaction between a fire and its surroundings or environment is illustrated in Figure 1.[8] This figure depicts a simplified model of migration of toxic chemicals and their potential impact on human, animal or plant receptors, including particulate matter through the air, deposition of airborne particulates, and movement of toxins by firewater. All of these pathways may cause soil, groundwater and surrounding surface water contamination.

Air emissions are by nature ephemeral and difficult to quantify directly since sampling can only be made when the fire is ongoing. However, emergency officials (fire, police, emergency management officials, HazMat officials) are trained to evaluate the immediate danger posed to a surrounding community and may issue evacuation orders due to knowledge of the fire source or as a conservative measure in the event the source is unknown. Ground-based sampling below the predicted movement of the air plume can provide more direct input concerning potential deposition of toxic soot and ash, based on local topography and meteorological modeling of the dispersion and extent of the fire plume zone. These sampling results are then compared with background levels of chemicals in soils not impacted by the fire event. Important contaminants to measure when quantifying the environmental impact from the fire plume include polycyclic aromatic hydrocarbons (PAHs), dioxins and furans, due to their incomplete combustion.[9]

sponders rely heavily on prior knowledge about the source of the fire to determine if the risk of using foams outweighs the risk of greater damage to the burning structure and a greatly prolonged fire fought with water.[13] The most common pathway to the environment of these firewater toxins are through the storm drainage system, which can result in discharge into local surface waters. Potential human exposure to chemicals in waterways may then occur through use of public drinking-water supplies during or immediately following the fire.[14]

Contamination of groundwater may also occur in large fires where

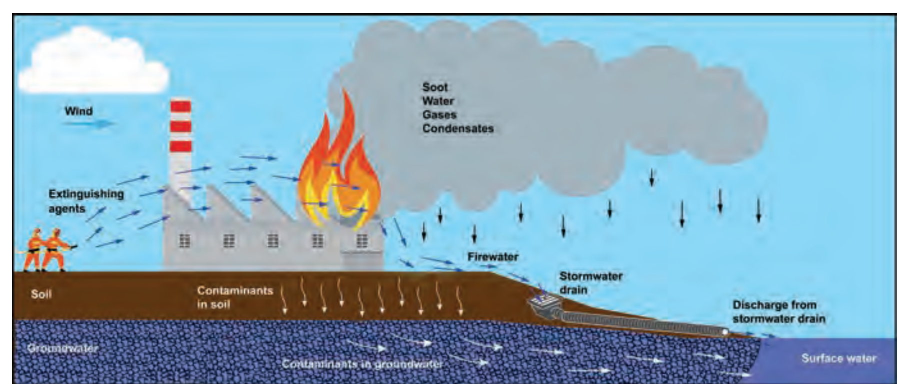

Figure 1. Emission pathways from fires (adapted from ISO 26367-1, 2019)

Chemicals may also be released in in the form of run-off from firewater, which is considered by some to be the most common pollutant pathway to the environment in a fire event.[10, 11] Contaminants in firewater run-off may include non-specific chemicals typically associated with combustion, as well as industrial chemicals and production sources found in storage facilities or manufacturing plants. Also, certain types of fires are often fought with chemical fire-retardant foams in place of water, which are usually either detergents or protein-based (e.g., surfactants).[12] These substances, while extremely effective in putting out fires quickly caused by flammable liquids (e.g., petrochemical plants), are not well characterized for biodegradability and toxicity to the environment. Therefore, first re-

chemicals leach into the groundwater from overlying contaminated soil; the efficiency of transport of contaminants through soil is linked to the soil type (e.g., sand, clay).[15] In these cases, the contaminated soil source must be removed to prevent continued movement of these chemicals into the subsurface aquifer. Groundwater may also need to be remediated in the most extreme cases, using technologies such as a pump and treat remedy which may need to operate for many years until concentrations of contaminants of concern meet drinking water standards. The possibility of groundwater contamination is why it is important to note if there are any drinking water wells within the area of a fire.[16,17]

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The Importance of Emergency Preparedness in Fire Effluent Pollution Prevention

As mentioned above, the type and magnitude of environmental damage that occurs during a fire is a complex product of the type of fire and the location of the fire with respect to susceptible ecological resources. Another important predictor of fire event severity is the emergency planning measures already in place. The use of environmental forensics to study industrial fires can make a significant contribution to improving emergency preparedness and generating "lessons learned" to reduce the consequences of these types of accidents. The application of safety and procedural measures serves to eliminate or reduce the main consequences and impacts of fire and the spread of toxic substances. In fact, the scientific examination and systematization of processes that reduce the possibility of major fire events can serve to lay the foundation for industry-wide attention to risk of fire and the endangerment to workers and the surrounding environment.[18]

A 2018 research study analyzing a variety of accidents in chemical process facilities in the US, Europe and Japan identified ways that emergency preparedness and response could be improved. The study concluded that emergency procedures and training for emergency situations are of utmost importance in manufacturing and process facilities that incorporate hazardous materials and higher-risk operations. Specific procedures should be in place for critical functions, such as power or process shutdown. In case of the possibility of natural hazards in facility operations, the assessment of those threats needs to consider the potential for their occurrence in combination, either simultaneously or sequentially, and their combined effects on multiple units of a plant. Companies should also set up high quality warning systems to ensure that everybody in the site and nearby facilities are informed about the emergency, and a map identifying the location of flammable process materials should be available to emergency responders. And finally, potential environmental impacts should be considered during emergency response, and firewater containment, either built-in or temporary, should be used to prevent firewater run-off.[19]

Summary

The process of assessing the impact of an industrial fire on the environment involves a complex array of factors that must be considered, such as the size and duration of the fire, proximity to sensitive environments, and toxic chemicals that may have been released in the fire effluents. To gain an understanding of the existence and scale of environmental liability for the facility owner, this article has outlined some basic information that may be obtained to determine a path forward. Finally, lessons learned from previous fires in industrial sectors aid in the development of effective operational protocols, including hazardous material management, facility configuration, and emergency response. These actions serve to decrease the risk of future fire events, and by association, negative effects on human health and the environment. ◆

Kimberly L. Davis, PhD, PE, PMP is an established environmental engineer with over 30 years of experience in providing strategy and implementation guidelines for various environmentally focused projects. She is with FORCON International, a GDLA Platinum Sponsor. Davis' expertise covers a wide array of matters, including environmental audits, soil and groundwater remediation, safety culture analysis, NEPA compliance and hazardous waste management.

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Forensic Accounting

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discrepancies, ensuring accuracy and integrity in financial reporting. Here's a deeper explanation of these techniques:

1. **Conducting interviews and interrogations:** Forensic accountants often interview individuals involved in financial transactions or with knowledge of the financial situation under investigation. These interviews help gather information, clarify discrepancies, and uncover potential fraudulent activities. Additionally, forensic accountants may assist attorneys in conducting interrogations to extract crucial information from suspects or individuals of interest, especially in cases of suspected fraud or financial misconduct.
2. **Tracing funds and transactions:** Tracing funds involves meticulously tracking the flow of money within an organization or between multiple entities. Forensic accountants use various methods, including analyzing bank statements, transaction records, invoices, and receipts, to trace the movement of funds. This technique helps identify any unauthorized or suspicious transactions, uncover hidden assets, and determine the ultimate destination or purpose of the funds.
3. **Analyzing financial records and documents:** Forensic accountants thoroughly examine financial records, such as income statements, balance sheets, tax returns, and general ledgers, to identify discrepancies, inconsistencies, or anomalies. By scrutinizing these documents, forensic accountants can detect fraudulent activities, misstatements, or manipulation of financial data. These same procedures are also used in legal disputes that often require a deep dive into financial records and transactions to provide evidence and independent validation of allegations.

Analysis

Beyond investigation, forensic accountants leverage their expertise in analyzing financial data to offer valuable insights and recommendations that can assist businesses, legal entities, and regulatory agencies. Here are more detailed examples of the ways this occur:

1. **Identifying patterns of financial misconduct:** Forensic accountants are trained to detect patterns or indicators of financial misconduct within complex financial data. By examining financial records, transactions, and other relevant documentation, they can identify irregularities, discrepancies, or suspicious activities that may suggest fraud, embezzlement, or other forms of financial misconduct. These patterns may include unusual fluctuations in financial metrics, unauthorized transactions, or anomalies in accounting entries.
2. **Assessing the extent of financial losses:** In cases where financial misconduct has occurred, forensic accountants play a crucial role in assessing the extent of financial losses incurred by the affected party. By analyzing financial records, transactional data, and other relevant information, they can quantify the financial impact of fraudulent activities, misappropriation of funds, or other forms of financial wrongdoing. This assessment helps stakeholders understand the magnitude of the losses and develop strategies for recovery and restitution.
3. **Quantifying damages in legal disputes:** Forensic accountants provide expertise in quantifying damages in legal disputes related to financial matters. In litigation involving breaches of contract, business disputes, or allegations of financial fraud, forensic accountants analyze financial data and provide detailed assessments of the economic harm suffered by the aggrieved party. Their quantitative analysis helps lawyers, judges, and juries understand the financial implications of the dispute and make informed decisions regarding liability and damages.
4. **Providing expert testimony in court proceedings:** Forensic accountants often serve as expert witnesses in court proceedings, providing testimony based on their analysis of financial data and findings from their investigations. Their expertise in financial matters, combined with their ability to present complex information in a clear and concise manner, makes them valuable assets in legal proceedings. Forensic accountants may testify about their findings, conclusions, and methodologies, helping to establish the facts of the case and assist the court in reaching a fair and equitable resolution.

The Future of Forensic Accounting: Technology and Trends

As we venture further into the digital age, the landscape of forensic accounting continues to evolve, propelled by technological advancements and emerging trends. Businesses are embracing the power of big data analytics to detect anomalies and trends, and, as AI-driven analytics continue to evolve, they are being used to sift through vast datasets and identify patterns indicative of fraud or financial irregularities. In addition, the ever-heightening threats of cybercrime, attention on environmental impacts of business activities, and complexities of cross-border transactions and related regulations all suggest that the future of forensic accounting is ripe with possibilities.

Ultimately, the importance of forensic accounting today cannot be overstated. As financial systems become increasingly interconnected and complexities abound, the need for meticulous oversight and scrutiny is more pressing than ever. By unraveling financial mysteries, detecting fraud, and providing expert analysis, forensic accountants serve as guardians of financial integrity, ensuring trust and transparency in an ever-evolving financial landscape. ◆

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Electronic Discovery

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subpoena for cell records. Obtaining the cell tower records quickly following a loss is critical as some providers do not retain the records for more than six months.

If the cellular provider no longer has the cell data and the insured asserts he has lost his cell phone, does the insurance carrier have any remedy when faced with a breach of contract and bad faith lawsuit? A federal court has answered that question, holding the insured can be sanctioned for spoliation of the evidence.

The insurers in the case of *Corey Brown v. Certain Underwriters at Lloyds, London, et al*., Case No. 16-CV-02737 (ED Penn. June 9, 2017) were investigating an incendiary fire. The two insurers, Certain Underwriters at Lloyds, London and Underwriters of Lloyds (collectively "Lloyds"), suspected that the insured Corey Brown started the fire. When Lloyds denied Mr. Brown's claim, he filed suit. During discovery, Lloyds requested the insured produce his cell phone. Just before his production, Mr. Brown filed an objection claiming that he lost his cell phone "months ago." Lloyds then filed a motion seeking sanctions against Mr. Brown for spoliation of the evidence.

To demonstrate the grounds for spoliation sanctions, Lloyds argued it was prejudiced by the loss of location information contained in the phone, as well as the substance of text messages and calls received or made at the time of the loss. The court concluded that the insured had control over his cell phone, and the information lost would have been "highly relevant to determine the merits" of the claim for insurance proceeds, as well as Lloyds' counterclaim for fraud. Mr. Brown argued that there was no prejudice, because Lloyds had "ample opportunity" to examine the phone but declined to do so. The court rejected that argument finding Lloyds was "no less prejudiced by the loss of relevant evidence because they could have chosen to request" the cell phone at an earlier date. The court noted that Mr. Brown should not have been surprised by the request for his cell phone. At his examination under oath taken two years before, Lloyds specifically requested that Mr. Brown preserve any evidence that was on his cell phone for possible discovery. In addition, Lloyds requested the cell phone information within the time permitted for discovery.

Having found that the loss information was relevant, the court then considered whether Mr. Brown intentionally suppressed or withheld the evidence. Mr. Brown produced an affidavit in which he swore that he lost the phone, and "did not intentionally dispose of it." The court rejected that self-serving affidavit finding:

> *… that Mr. Brown's undetailed account of losing his phone is not credible and that, rather than innocently losing his phone, Mr. Brown made a deliberate choice to withhold it from production. In making that finding we note that Mr. Brown and his attorney did not notify Lloyds of the loss of relevant evidence that he had a known duty to preserve until hours before the requested time of production, even though its loss had supposedly been known for at least four months. Mr. Brown has offered zero explanation as to how he came to lose his phone. He has also offered no indication that he took even rudimentary steps to preserve the evidence that existed on his phone, as was his obligation, or to take any measures to find the phone after it was somehow lost.*

Because of the insured's action, the court found that Lloyds was prejudiced, and such prejudice was significant "enough to weigh in favor of sanctions." While Lloyds wanted the court to issue the ultimate sanction—the dismissal of Mr. Brown's claim—the court elected to issue an adverse jury instruction as it would "likely be sufficient to cure the prejudice" to Lloyds. The court thus agreed to instruct members of the jury that "they may infer that if [Lloyds] were permitted to inspect Mr. Brown's cell phone, any evidence would have been unfavorable to Plaintiff."

As a result of the *Brown* decision, insurance carriers should consider and be prepared for two possibilities. First, an insurer should acknowledge that it also could be found on the receiving end of spoliation sanctions if it fails to preserve material and relevant information. Insurers thus should ensure that procedures are implemented to preserve such information. Second, because a cell phone can contain material and relevant information, early in the claim an insurer should make a demand that the insured preserve cell phones, as well as any other electronic evidence. These demands can be made in reservation of rights letters or in the written request for an insured's EMO. If the insured fails to preserve the evidence, and suit is filed, the insurer may be able to obtain sanctions because of the insured's spoliation of evidence.

The digital age has transformed the landscape of evidence collection and analysis in legal proceedings, particularly in insurance matters. The proliferation of mobile devices and electronic data provides a treasure trove of information that can significantly impact the outcome of a case. This presentation aims to underscore

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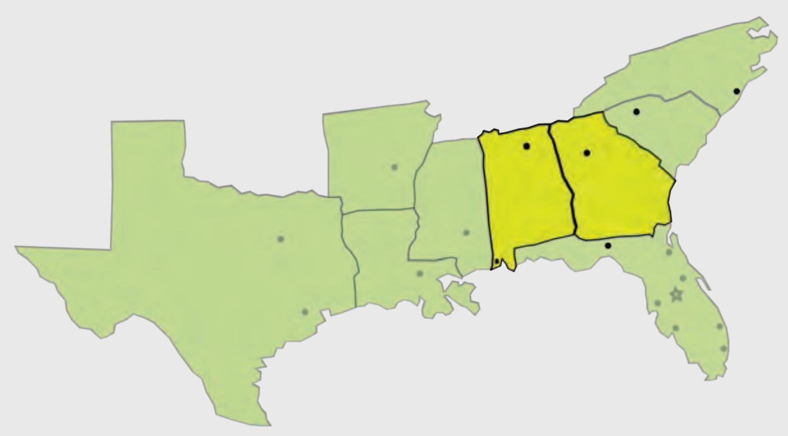

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the importance of investigating mobile devices and other electronic data in insurance matters, illustrating how these resources can help legal teams reconstruct user activities and ultimately strengthen their cases.

The Significance of Mobile Devices in Legal Investigations

1. Comprehensive Data Source: Mobile devices are repositories of a vast array of data, including call logs, text messages, emails, app data, photos, videos, and more. This data can provide crucial insights into the user's actions, intentions, and interactions relevant to an insurance claim.

2. Geo-Location Data: Modern smartphones constantly track and store location data through GPS and various applications. This information can be pivotal in establishing the whereabouts of a user at specific times, thereby corroborating or refuting claims.

3. App Data: Applications on mobile devices generate and store extensive logs of user activities. For instance, social media apps can reveal communication patterns, while financial apps can show transaction histories. This data helps in painting a comprehensive picture of the user's lifestyle and behaviors.

Investigating Electronic Data: Best Practices

1. Identifying Relevant Data Sources: Legal teams should know where to look for pertinent information. This includes mobile devices, computers, cloud storage, social media accounts, and Internet of Things (IoT) devices. IoT describes devices with sensors, processing ability, software and other technologies that connect and exchange data with other devices and systems over the Internet or other communication networks. Each source can provide different pieces of the puzzle.

2. Preservation of Evidence: It's critical to preserve electronic data in its original form to maintain its integrity. Legal teams should employ forensically sound methods to extract and store data, ensuring it remains admissible in court.

3. Data Analysis Techniques: Using advanced data analysis tools and techniques can help in sifting through vast amounts of data to identify relevant information. Pattern recognition, keyword searches, and timeline reconstruction are some of the methods used in analyzing electronic evidence.

Case Studies and Examples

1. Fraudulent Claims: In cases of suspected insurance fraud, mobile device data can reveal inconsistencies in the claimant's story. For example, geo-location data might show that the claimant was not at the accident scene when they said they were.

2. Personal Injury Claims: App data from fitness trackers or health apps can be used to verify the extent of injuries claimed. A claimant who alleges severe physical limitations might have activity logs that contradict their claims.

3. Property Damage Claims: Photos and videos stored on mobile devices can provide visual evidence of the condition of a property before and after an alleged incident, helping to validate or dispute the claim.

Legal and Ethical Considerations

1. Privacy Concerns: Investigating electronic data involves handling sensitive personal information. Legal teams must balance the need for evidence with the individual's right to privacy, ensuring compliance with data protection laws.

2. Admissibility of Evidence: For electronic data to be admissible in court, it must be collected and handled according to established legal standards. Legal teams should be familiar with the rules of evidence concerning digital data to avoid challenges during litigation.

3. Ethical Use of Data: Ethical considerations include ensuring that data is not manipulated or misrepresented. Legal teams must present electronic evidence fairly and accurately, maintaining the integrity of the judicial process.

Conclusion

The investigation of mobile devices and other electronic data is a critical component of modern legal practice, particularly in insurance matters. By leveraging the wealth of information available from these sources, legal teams can reconstruct events, validate claims, and uncover inconsistencies. This comprehensive approach to evidence collection and analysis not only helps in winning cases, but also upholds the principles of justice and fairness. ◆

Robert J. "Rob" Draper is a seasoned expert in electronic discovery with over 25 years of experience. As the Owner and President of GDLA Platinum Sponsor Relevant Data Technologies, Draper has advanced the practice of e-Discovery through innovative solutions and expert leadership. His expertise covers all aspects of electronic data management, including data identification, preservation, collection, processing, analytics, and hosting.

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Legal Nurse Consultant

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reviewed by an LNC can greatly assist the biomechanical engineer in understanding how an incident actually occurred. Utilizing real-world experience and significant medical knowledge, LNCs can review incident reports to determine which claims are supported and which may be inaccurate.

As most injuries that occur or are claimed with MVAs are structural, it is important to have an extensive working knowledge of orthopedics, neurology, and neurosurgery. To delineate potential inconsistencies, it is important to know what is normal and what are the practical and functional implications of pathologic conditions. Having a strong background in orthopedics/neurosurgery makes this process easier. Being able to draw from prior knowledge and experience allows the LNC to give knowledge-based, insightful comments to help the biomechanical engineer and the client understand the injuries.

Another aspect of the LNC's summary that is of importance to the biomechanical engineer is maintaining simplicity. LNCs must eliminate as much extraneous information as possible within the summary. Taking out superfluous prepositions, such as 'the,' 'an,' and 'a,' allows a condensation of verbiage, and thus, the information noted to have the most importance. Having a contextual understanding of when to take out prepositions, or when to keep them for easier understanding, is also important. The grid should be clear, concise, and quick to read for both the biomechanical engineer and the client. The summary can be added to the analysis report given to the client, as requested. It is also important that the comments made within the grid are neutral and fact-based, as the client may be able discover the comments even when deleted.

Case Study:

RC is a 65-year-old female restrained driver at a stop, waiting to turn right at an intersection. As the traffic cleared, she eased ahead but saw another car coming from her left and stopped quickly. The car behind her did not see that she had stopped and rear-ended her. The airbags did not deploy and there was no head strike within the car or loss of consciousness (LOC). Police arrived, and a citation was given to the other driver for failure to stop and following too close. RC declined EMS transfer, as she said she was fine and without pain. She drove herself home and went to sleep. RC's pain increased as she slept and she presented in the Emergency Department with complaints of neck pain, radiating to the bilateral shoulders. She also

complained of low back pain, radiating into the bilateral buttocks. She is a retired schoolteacher and enjoys gardening and walking for exercise. She admits to smoking a ½-pack of cigarettes daily for the past 45 years, with no desire to stop. She has a history of asthma, two heart attacks with a stent placement, and anxiety/depression. She had one MVA, 10 years ago, with slight residual pain in neck and low back.

Radiology:

- CT scan C-spine showed multilevel degenerative disc disease with disc herniation at C4-5, C5-6, and C6-7.
- CT scan L-spine showed multilevel degenerative disc disease with disc herniation at L3-4, L4-5, and L5-S1.
- Diagnosis: C-spine sprain, cervicalgia, C-spine radiculopathy, L-spine sprain, lumbago, L-spine radiculopathy

Points of interest for the LNC:

- Restrained
- No airbag deployment
- Rear-ended
- No head strike or LOC
- No pain immediately after impact
- Walks for exercise
- Smoker without desire to quit
- Asthma
- Heart attack with stent placement
- Anxiety/depression
- Prior MVA with prior injury to neck and low back with residual pain
- Radiology imaging showed both C-spine and L-spine multilevel degenerative disc disease. C-spine has disc herniations at C4-5, C5-6, and C6-7. L-spine has disc herniations at L3-4, L4-5, and L5-S1.
- Diagnosis from ER provider: C-spine and L-spine radiculopathy voiced by the radiating pain into bilateral shoulders and bilateral hips.

What does this all mean?

- RC was restrained with modern seatbelts equipped with pretensioners and inertial-locking retractors. As the pretensioners do not fire in a rear-end impact, the retractors will prevent the person from striking the steering wheel.
- No airbag deployment, so there were no airbag injuries.
- No pain immediately after impact. This is common, as most often pain is due to muscle strain.
- RC admits to smoking a ½-pack of cigarettes per day. Many people understate how much they truly smoke.
- Anxiety and depression play a role with exacerbation of pain perception. Anxiety can play a part in hindering rehabilitation of injuries (Woo, 2010).
- A prior MVA caused prior injury to RC's neck and low back.
- CT scans showed degenerative changes and disc herniations on both C-spine and L-spines. The

degenerative changes are age-related, and the disc herniations have no causal link to rear-end impact or any type of low-speed, low-velocity impact. (Wood, Grrenston, Charles, & Charles, 2018)
- Because of the low speed of this MVA, it is expected that the pain experienced to resolve within six weeks (about one and a half months) with physical therapy and rest (Karlsson, et al., 2020).

Outcome

- A verbal report was made to the client with all the facts given. The accident was at low speed, and the pain was assessed as muscular pain that would resolve within a few months. No further treatment would be needed.

Legal nurse consultants are highly valued for their vast array of skills and experiences, allowing each LNC the opportunity for niche practices. One such niche is a targeted medical record review used in conjunction with a biomechanical engineer to prove injury consistency analysis. The medical record review and summary point out areas that are vital facts needed for the injury analysis, allowing the client to use them for legal proceedings or insurance investigations. The LNC, with the appropriate knowledge and experience, provides the crucial information needed for the biomechanical engineer and the client. ◆

Lisa M. Powers, BSN, RN, CNOR, CAISS, LNCC, is a Registered Nurse with 38 years of experience in intensive care units, trauma care, and orthopaedics. Powers currently works as a Legal Nurse Consultant with GDLA Platinum Sponsor Rimkus, a global consulting firm, where her responsibilities include reviewing medical records and assisting consulting experts and clients with understanding the medical aspects of their cases.

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