So-Called "Treating Physicians" and the Catch-22 of Rule 26(a)2)

Driver's Expectation of a Hazard vs. its Visibility

Lemonade, Drones and Cyber Business Interruption

OSHA's Spread the Liability Regulation Update

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

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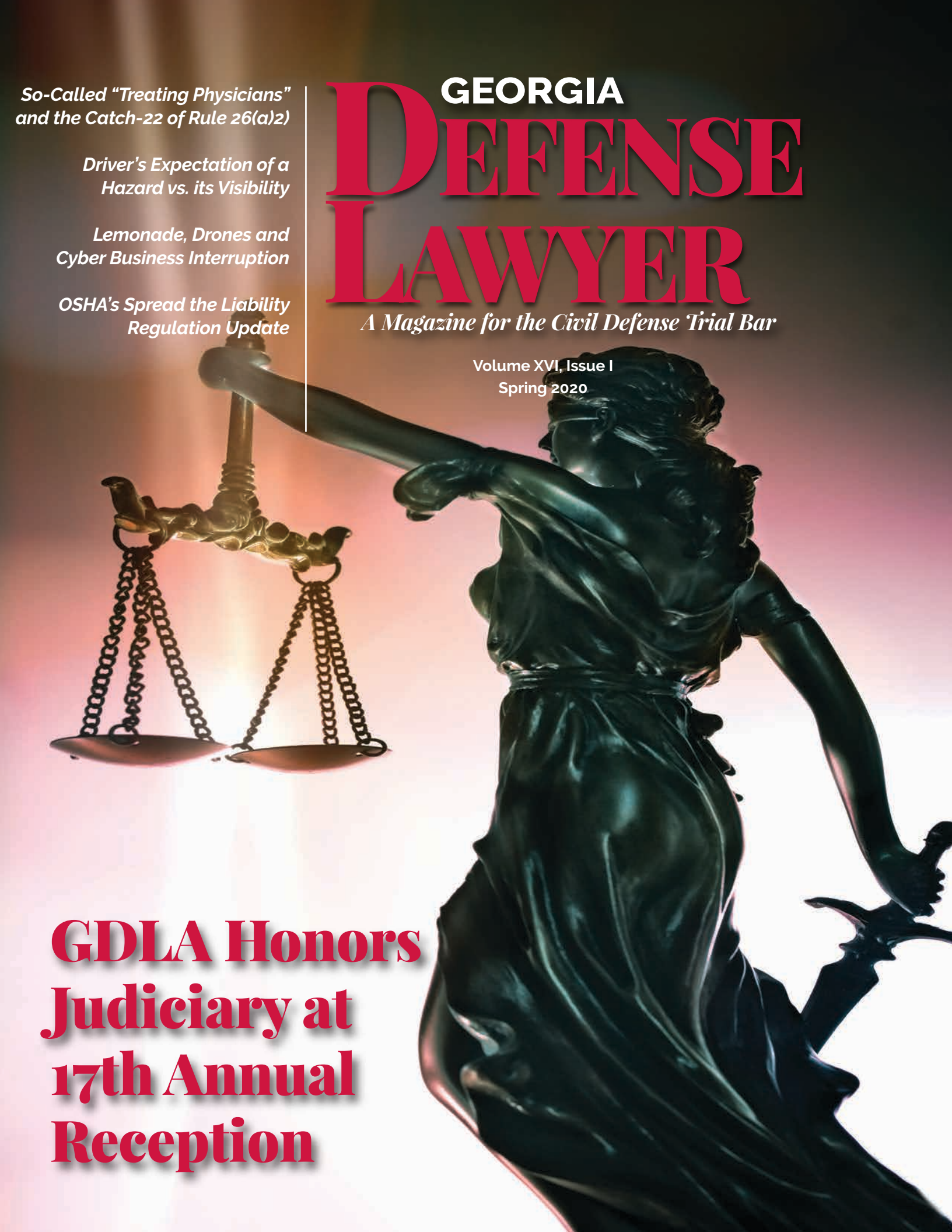

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GEORGIA DEFENSE LAWYER
Volume XVI, Issue I

President's Message

I am proud to report that GDLA continues to be a great resource and advocate for the interests of the civil defense bar under the stewardship of its Board of Directors and Executive Director.

Jake Daly of Freeman Mathis & Gary, who chairs our Legislative Committee in Atlanta, was asked to present testimony on behalf of GDLA to the Senate Study Committee on Reducing the Cost of Doing Business in advance of this year's legislative session. Various bills were likely to be considered while the legislature was in session that may have an impact on the civil defense bar, including whether to allow for the seat belt defense and a bill on "phantom damages." GDLA supports these initiatives, but did not take a position on other proposals made by the Senate committee.

The GDLA Amicus Committee has continued its excellent work under the new leadership of Elissa Haynes of Drew Eckl & Farnham in Atlanta and Vice-chairs Anne Kaufold-Wiggins of Balch & Bingham in Atlanta and Philip Thompson of Ellis Painter in Savannah. Over the past six months the committee's efforts have resulted in numerous briefs (see pages 18-36).

Most recently, the Court of Appeals sided with GDLA's *amicus* brief in *St. Jude's Recovery Center* regarding the application of the voluntary undertaking doctrine to a random, unforeseeable third-party criminal attack that occurred approximately one mile away from the defendant's premises. Many thanks to Sandra Foster and Tracie Macke of Brennan Wasden & Painter in Savannah for authoring our brief.

In *Bolton*, the issue was whether a property owner could be deemed to have constructive knowledge of crimes based on police reports of incidents otherwise unknown to the property owner. The Court of Appeals declined to adopt a constructive knowledge standard and the Georgia Supreme Court denied Plaintiff's petition for certiorari. Hats off to our brief's author, Matt Boyer of Nall & Miller in Atlanta.

In *Daly*, GDLA filed an *amicus* brief in the Supreme Court supporting the grant of certiorari on the issue of whether a jury charge on assumption of the risk is authorized by even slight evidence. Amicus Chair Emeritus Marty Levinson of Hawkins Parnell & Young in Atlanta penned the brief. The Supreme Court granted cert and GDLA filed another *amicus* brief, again authored by Marty, seeking a reversal of the Georgia Court of Appeals' opinion. We appreciate his dedication.

The Georgia Supreme Court invited GDLA, along with the state's Attorney General, to file *amicus* briefs in *Reid v. Morris* to express their views on whether O.C.G.A. § 51-12-5.1, which provides for caps on punitive damages under certain circumstances, violates the provisions of the Georgia Constitution protecting the right to a jury trial and providing for the separation of powers. Elissa and Marty co-authored that brief; oral argument was postponed due to COVID-19.

GDLA is a true statewide organization with active members throughout Georgia. Please join me in thanking the hard-working members who volunteer their time into making this such a vibrant organization, be it through the Amicus Committee, *Law Journal*, CLE and Annual Meeting presentations or authoring an article for this magazine. Through our members GDLA continues to be the strong organization we all desire supporting the interests of the defense bar.

For the defense,

David N. Nelson
Chambless Higdon Richardson Katz & Griggs, Macon

A Message from DRI

By Matthew G. Moffett, DRI State Representative
Gray Rust Moffett St. Amand Moffett & Brieske

Please identify a young lawyer in your firm and sponsor them for membership with DRI—The Voice of the Defense Bar. That then qualifies them for a free year of GDLA membership. That's a savings of $150 in dues. We need our young members to invigorate our ranks!

GDLA is the sixth largest state organization within DRI. And our membership grew more in 2019 than *any* other state organization's membership, according to the last compiled monthly metrics.

DRI dues for lawyers admitted to a state bar five years or less are $185. Future DRI President and GDLA member Douglas Burrell reminds me that DRI dues includes free registration for one DRI seminar of choice (a value of over $700).

This year's DRI Young Lawyers seminar is taking place in Atlanta at the Intercontinental Hotel from June 24-26, 2020, making it a great choice for the complimentary seminar included with a first-time DRI member's dues.

Attendees will hit the ground running at the seminar with an interactive drills workshop on cross-examination skills—which is being planned with help from GDLA—and keep up the momentum by learning how to develop trial-winning cases from Day Zero and beyond. Attendees will hear from exceptional in-house and outside counsel on topics such as preparing company witnesses for deposition and trial, ways to win business as a young lawyer, using technology effectively and persuasively during discovery and trial, and more! And of course there will plenty of "can't miss" networking events after the learning has concluded for the day. It will be a great opportunity for every young lawyer to expand their network, while gaining knowledge and sharpening skills.

Once your associate has successfully joined DRI, he or she should look for the GDLA application under the Membership tab of our website. The applicant will confirm his or her membership in DRI, meaning no dues payment will be required for a year.

Being a part of both DRI and GDLA is important. Together we can strengthen the voice of the defense bar in Georgia and nationwide! ◆

Member News & Case Wins

MEMBER NEWS

Hall Booth Smith announced that **Ann Baird Bishop**, formerly with **Sponsler Bishop Koren & Hammer**, has joined the firm's Atlanta office as of counsel. She has four decades of experience representing employers and insurers in a wide variety of workers' compensation matters. In 2012, Ms. Bishop was inducted as a Fellow into the College of Workers' Compensation Lawyers and serves on its Board.

Waldon Adelman Castilla Hiestand & Prout in Atlanta announced that **Marcia Stewart Freeman**, **Travis Meyer** and **Brian McCarthy** have been named partners in the firm. Ms. Freeman's practice is focused on insurance defense. Mr. Meyer concentrates on insurance defense and motor vehicle liability. Mr. McCarthy practices in the areas of insurance defense, insurance coverage, motor vehicle liability, and civil/commercial litigation.

M.B. "Burt" Satcher III and **Annarita McGovern**, formerly with **Coleman & Talley**, announced the formation of **Satcher & McGovern** in Alpharetta. The firm represents a range of clients in the areas of medical malpractice, employment, government liability, civil rights, product liability, and premises liability.

Gray Rust St. Amand Moffett & Brieske in Atlanta announced that **David C. Sawyer** was named partner in the firm. His practice primarily focuses on defending companies and individuals in construction, wrongful death, and personal injury litigation. He also frequently advises on questions related to insurance coverage.

Baker Donelson announced that **Suneel Gupta** was elected shareholder in the Atlanta office. Mr. Gupta concentrates his practice in transportation litigation, autonomous vehicles, and various types of liability defense and litigation.

Dawn N. Pettigrew, formerly with **Mabry & McClelland**, has joined the civil litigation defense practice group at **Hudson Parrott Walker** in Atlanta. She will maintain a general civil defense practice focusing on the areas of commercial general liability, director and officer liability, premises liability, property loss, and construction defects.

Drew Eckl & Farnham announced the addition of associates **Carrie Coleman** and **Patrick Ewing** in its Brunswick and Atlanta offices, respectively. Both focus their practices on general liability.

Copeland Stair Kingma & Lovell announced the elevation of **Jay O'Brien** and **Stephanie Vari** to partner in the Atlanta office. Mr. O'Brien's practice includes catastrophic injury, premises liability, and transportation litigation where he represents individuals, corporations and retailers in a variety of complex general liability matters. Ms. Vari is a member of the firm's health care practice group. She leveraged a nursing career into a successful law practice defending medical providers and health care organizations in allegations of negligence and malpractice.

Rutherford & Christie, with offices in New York and Atlanta, announced the elevation of **Courtney M. Norton** to partner in Atlanta. Ms. Norton litigates cases in both state and federal court, representing clients on a nationwide basis, handling a wide range of employment cases—from Title VII defense to claims for employee benefits. Experienced in complex insurance defense litigation, she focuses on life, health and disability litigation, particularly under the Employee Retirement Income Security Act (ERISA), and state and federal Racketeer Influenced and Corrupt Organization (RICO) laws.

Shellea D. "Shelly" Crochet, formerly with **Lewis Brisbois**, has joined the coverage and civil insurance defense litigation practice group at **Fields Howell** in Atlanta. She focuses her practice on, commercial general liability coverage, declaratory judgment actions, bad faith litigation, general insurance defense, premises liability, and general tort litigation.

Groth & Makarenko, a boutique firm located in Suwanee, announced that **Jay Eidex** and **Joseph Kaiser** have been elected to partnership. Three attorneys were added to their associate ranks: **Scott Eric Anderson** joined the firm after working as staff counsel at one of the largest insurers in the United States; **Ankur P. Trivedi** joined after operating his own practice for several years; and **L. Ashley Vest** previously worked as in-house counsel for two national insurance carriers.

Patrick W. Leed, formerly with **Drew Eckl & Farnham**, has joined **Dennis Corry Smith & Dixon** in Atlanta as an associate. He will practice in the areas of transportation litigation and complex civil litigation.

James-Bates-Brannan-Groover, with offices in Macon and Atlanta, announced the addition of **Richard "Rick" A. Epps, Jr.** to the firm's financial institution and real estate practice group. He focuses his practice on all areas of commercial real estate law, including acquisi-

Continued on page 10

Member News

Continued from page 8

tions and loan closings, contract negotiation, lender representation, title examination, title insurance and drafting of closing documents. Prior to joining James-Bates, Mr. Epps was a partner at **Martin Snow** where he worked for 19 years focusing primarily on the defense of medical malpractice actions. The firm also announced that **Michael Thompson** has joined its general litigation practice group as an associate. He focuses on insurance defense, liability defense, and commercial litigation.

Tyler Bryant Walker, formerly a partner at **Goodman McGuffey**, has joined **Fields Howell** as of counsel in its Atlanta office. Her practice will continue to focus on insurance coverage and commercial litigation with an emphasis on bad faith defense.

Wilson Elser announced that **Sharon Horne** has joined its Atlanta office as of counsel. She is a member of the firm's commercial litigation, insurance defense, and complex tort and general casualty practices.

CASE WINS

Scott H. Moulton and **Sandro Stojanovic** of **Hall Booth Smith's** Atlanta office obtained a favorable verdict in a trucking accident case in the U.S. District Court for the Northern District of Georgia in front of Judge Eleanor Ross. The case arose out of a T-bone accident in Southwest Atlanta. Defendants admitted negligence in causing the accident. Plaintiff claimed injury to the lumbar spine, necessitating a laser disc decompression surgery, in addition to numerous injections and nerve blocks. Defense arguments were that the laser disc procedure was unnecessary, because it had no medical support and that the treating physician overcharged Plaintiff way above the reasonable and customary amount. The total medical expenses were $235,000. The last demand prior to trial was $1.9 million. Plaintiff asked the jury for a $3.25 million verdict. The jury returned a verdict for $157,000. The jury did not award any money for the laser disc decompression surgery and lowered the past medical expenses by $90,000. Also, the jury only awarded $20,000 for future medical expenses and future pain and suffering.

The Court of Appeals awarded summary judgment for **Jones Cork's** client contractor where a subcontractor's employee did not

produce evidence of liability. **Callie Bryan** and **Barret Kirbo** represented the contractor who was sued by the plaintiff over injuries sustained in a fall from an allegedly defective ladder. The trial court denied the contractor's summary judgment motion. The Court of Appeals reversed the denial of that motion, effectively dismissing the case against their client. The defendant subcontracted a repair job to a subcontractor, who hired the plaintiff to assist him. The plaintiff contended their client provided the plaintiff with a ladder. Two men other than the plaintiff had used the ladder without incident. When the plaintiff used the ladder, a rung at the top broke and he fell, suffering a neck injury that required surgery. The plaintiff acknowledged that he did not inspect the ladder before using it, but assumed that it was safe. He sued Jones Cork's client, alleging that the contractor had actual or constructive knowledge of a defect and that it was negligent in not maintaining or inspecting it. The defense argued that the plaintiff failed to produce any evidence of the contractor's liability.

The trial court denied the motion, but on appeal, the Court of Appeals agreed that the plaintiff produced no evidence to show that the contractor knew or should have known of a defect in the ladder. While an employer has a duty to keep tools in good working order and to warn employees of latent defects, employees have reciprocal duties to exercise ordinary care for their own safety. An employee cannot recover damages for injuries resulting from a defective tool if, in the exercise of ordinary care, the employee could have discovered the defect.

Thus, to recover for his injuries, the plaintiff had to show that the ladder was defective and that the employer was aware or could have learned of the defect. The fact that the ladder broke while it was in use is not sufficient to show that it was defective in some respect. The plaintiff based his claims on mere possibilities and speculation, which is not enough to create an inference of fact for consideration on summary judgment. Thus, the appellate court reversed the trial court's denial of the contractor's summary judgment motion and remanded the case for entry of judgment in favor of the defendant.

The State Board of Workers' Compensation has instituted, in the past year, a new workers' comp compensation petition for medical treatment (WC-PMT) procedure for telephonic show cause hearings regarding approval of treatment and/or testing made by authorized treating physicians. Last Fall, **G. Robert Ryan, Jr.** of **The Ryan Law Firm** in Valdosta encountered a situation where the claimant's attorney filed a WC-PMT to seek a ruling that he would be allowed to treat with a non-panel physician. Mr. Ryan proceeded to the telephonic show cause hearing and argued that the WC-PMT procedure was not designed to resolve issues of who should be named the authorized treating physician, and that claimant's WC-PMT should therefore be dismissed on procedural grounds. Administrative Law Judge Nicole Tifverman agreed with Mr. Ryan's position and issued an order dismissing the WC-PMT on September 24, 2019. This stands for the proposition that the defense can obtain dismissal of the PMT on procedural grounds when claimants attempt to use it for purposes beyond what is specifically set forth in the Board Rule.

Goodman McGuffey attorneys **Robert A. Luskin** and **Alyce B. Ogunsola** obtained a complete grant of summary judgment in favor of their client, a regional healthcare facility. Plaintiff, a woman of Columbian decent, filed a lawsuit in the U.S. District Court for the Middle District of Georgia alleging that she was discriminated against and subjected to a hostile work environment at a hospital where she was employed, in violation of 42 U.S.C. § 1983. She also asserted a claim for retaliation under the False Claims Act.

After extensive discovery, the Goodman McGuffey team filed a motion for summary judgment, arguing that Plaintiff essentially abandoned her racial discrimination claim by failing to produce any evidence of discrimination in her employment or termination. The defense team also established that Plaintiff's purported seven instances of alleged racial harassment, including comments that could potentially be directed at her national origin, over the course of eight years were neither severe nor pervasive enough to rise to the level of a hostile work environment. Finally, the defense contended that Plaintiff did not engage in protected activity under the False Claims Act when she told the Chief of Staff that she believed a handful of patients were being kept longer than she believed was medically necessary and when she opined that a peer review should be conducted.

The Court agreed with the defense's argument that Plaintiff failed to support her discrimination claim. The Court also found that while Plaintiff may have perceived the incidents of alleged racial harassment as subjectively hostile, they were not sufficiently objectively hostile to constitute a hostile work environment. The Court found that Plaintiff's complaints were not related to fraudulent claims for federal funds and, therefore, she had not engaged in protected activity under the False Claims Act. Ultimately, the Goodman McGuffey team prevailed, and the Court granted summary judgment in the defendants' favor on all counts.

The case is *Vazquez v. Upson Cty. Hosp., Inc.*, No. 5:18-CV-00073-TES, 2019 WL 5395447, at *1 (M.D. Ga. Oct. 22, 2019).

Continued on next page

Member News

Continued from previous page

Chuck Dalziel, in his first case as the Dalziel Law Firm, represented the CEO of a financial firm who had an alcohol-related accident while he was CEO. Despite the CPA firm's initial support, it did a 180 the following day, and fired the CEO, while he was in treatment after the accident, for violation of the company's alcohol policy. The CPA firm moved aggressively through outside counsel to seek a forfeiture of the CEO's financial interest in the company if he did not agree to a five-year long restriction on his ability to work in the future. After a series of emails from Mr. Dalziel pointing out the injustice of concocting such restrictions when the parties' contract did not provide for them, the company relented, eliminating its outside counsel from the equation, paying the former CEO everything to which he was entitled, as well as satisfying all the debt he owed to the firm per the contract. The CPA firm had tried to obtain very burdensome restrictions on his client in the future, but upon conclusion, received none of those restrictions, paying Mr. Dalziel's client 100 percent of what he was owed without litigation.

Carrie L. Christie, a name partner with **Rutherford & Christie** in Atlanta and her associate, **Ann Potente**, recently won summary judgment in a premises liability case involving a child who sustained burns to the soles of his feet while playing in a restaurant's outdoor play area. Ms. Christie and Ms. Potente successfully excluded the testimony of plaintiff's chemical expert who attempted to relate the cause of the child's burns to a cleaning solution purportedly used on the playground. The expert admitted it was speculative as to whether the child actually came into contact with any cleaning solution while in the play area. Having won their *Daubert* motion against the plaintiff's expert, the defense duo argued, in a subsequent motion for summary judgment, that the plaintiff lacked expert testimony to meet their burden of establishing the causation element of their negligence claim.

On January 13, 2020, **Ms. Christie and Ms. Potente,** along with local counsel, GDLA President-Elect **Jeffrey S. Ward** of **Drew Eckl & Farnham's** Brunswick office, obtained summary judgment in the U.S. District Court for the Southern District of Georgia before Judge Lisa Wood. The plaintiff, a local church, alleged that the roof of their building sustained wind damage from Hurricane Matthew which, in turn, caused water intrusion damage to the building's interior. The defense trio successfully excluded the testimony of three of the plaintiff's experts relating the cause of the roof failure to wind damage from the hurricane. Thereafter, they filed a motion for summary judgment. The Court found that the relevant insurance policy contained a provision excluding damage from rain unless it was caused by a specified peril such as a windstorm. To support its argument that the damage to the church was caused by wind and rain, the church could not rely on lay testimony alone and thus could not rebut the defense's expert evidence that the damage was caused by poor workmanship, most notably improper flashing, which was not covered by the policy. The Court stated that unrebutted expert causation testimony was deemed "uncontroverted evidence" and created no genuine dispute of material fact. The Court held that the defense's expert opinion constituted uncontroverted evidence that the damage to the church was not caused by a covered peril and therefore granted summary judgment for the defense.

GDLA President-Elect **Jeffrey S. Ward**, a partner with **Drew Eckl & Farnham** in Brunswick, teamed up as local counsel to DRI Past President **Cary Hiltgen** of **Hiltgen & Brewer** in Oklahoma City to notch a defense verdict in a case involving commercial off-road woodchippers. Brent Savage of Savage Turner in Savannah represented the plaintiff, ROW Equipment, a South Georgia company that rents out equipment and provides services for clearing lumber. Plaintiff claimed the equipment was unreliable and prone to breakdowns in breach of the manufacturer's warranties. The defense showed that it serviced each woodchipper when needed, and that the plaintiff even bought a second one after complaining of unreliability. In a week-long trial before Judge Stan Baker in the U.S. District Court for the Southern District of Georgia in Waycross, plaintiff's counsel asked for special damages of $887,000 and attorneys' fees of over 33 percent, for a total of almost $1.3 million. The jury returned a defense verdict on Friday, December 13, at 8:30 p.m. after deliberating four hours.

On January 8, 2020, a Cherokee County jury entered a verdict of only $4,546.75 in favor of a plaintiff who sought $37,000 for past medical bills and over $10,000 in lost wages. GDLA Vice President **Ashley Rice**, a partner at **Waldon Adelman Castilla Prout & Hiestand** in Atlanta, represented the defendant who admitted to striking Plaintiff's vehicle twice in 2016 but contended that neither impact was very hard. Plaintiff went to the emergency room a few hours after the accident with complaints of neck, left shoulder, and back pain. A subsequent MRI revealed a left rotator cuff tear. Plaintiff was recommended for surgery and underwent multiple injections to her spine. She claimed to have been unable to work for seven months. Following a three-day trial, the

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jury's award represented the amount of Plaintiff's initial emergency room bill. Before trial, Plaintiff demanded $99,000. Defendant's highest offer was $11,500.

James Merritt, Jr. of **Vernis & Bowling** in Atlanta has enjoyed a series of recent successes. The first was an automobile accident in which the plaintiff's vehicle was totaled and his client admitted sole negligence in causing the accident. The plaintiff claimed orthopedic spinal injuries which led to multiple surgical procedures, including implantation of a spinal cord stimulator. The plaintiff also claimed to have had an allergic reaction to a pain medication prescribed for his injuries, which he claimed then caused his kidney disease to progress to stage-4 failure, requiring dialysis and necessitating a transplant. In total, the plaintiff had around $750,000 in total special damages and claimed permanent injuries and disabilities from the accident, as well as a permanent loss of future income. Mr. Merritt's insurer had two policies that combined to provide $1.1 million in total liability coverage, yet they rejected the plaintiff's policy-limits demand. The Friday prior to trial, Mr. Merritt offered $500,000 to settle, but the plaintiff rejected that. The next day, an offer of $750,000 was also rejected. The defendant testified at trial and took complete responsibility for causing the accident, but explained that the property damage was not as bad as the photos looked. After a one-week jury trial in the Superior Court of Glynn County, plaintiff asked for over $10 million in closing argument. Defense counsel's closing suggested a total verdict of between $30,000-$50,000. After deliberating for only about 30 minutes—15 minutes of which was spent selecting a foreperson—the jury returned a total verdict of only $2,500, including $0 for pain and suffering and $0 for the plaintiff's extensive kidney injuries and treatment. Plaintiff filed a motion for a new trial, on which the parties are currently awaiting a ruling.

In another case in Gwinnett State Court, Mr. Merritt represented Staples and its driver after their 26-foot delivery truck collided with the plaintiffs' SUV in an office complex parking lot. Staples denied liability and, at mediation, offered around $35,000 while the plaintiffs would not lower their $1 million demand. The plaintiffs claimed a combined total of around $250,000 in medical bills, which included surgery on one of them. Photos of the property damage were unimpressive—the plaintiff's Honda Pilot SUV sustained only minor damage costing around $1,500 to repair. All the plaintiffs' treating doctors blamed their injuries on the subject accident. However, the defense offered the un-rebutted testimony of a biomechanical expert, who testified that the force of this minor, low-speed parking lot accident could not possibly have caused any injuries more than a temporary soft tissue injury. Given the venue, Mr. Merritt hired a jury consultant to assist in *voir dire*. After a three-day jury trial, plaintiff's counsel asked the jury for over $1.3 million. After deliberating for about two hours, the jury returned a defense verdict. The plaintiffs hired appellate counsel and filed a motion for a new trial. Mr. Merritt's response in opposition included a cross-motion for attorneys' fees for frivolous litigation. The plaintiffs' trial counsel then withdrew from the case altogether and their appellate counsel withdrew his motion for a new trial just days before oral argument was scheduled.

In another case in Douglas County Superior Court, Mr. Merritt was defending one of two different drivers. The objective evidence established that the sole cause of the subject accident was the negligence of the other defendant. When Plaintiff's counsel refused to let Mr. Merritt's client out of the case, he served a statutory Offer of Settlement. Shortly before the jury trial, Plaintiff's counsel again refused to dismiss his client. After two days of evidence, when the Plaintiff rested, Mr. Merritt moved for and won a directed verdict. Two days later, after the plaintiff finally obtained a judgment against the at-fault co-defendant, Mr. Merritt obtained a judgment against the plaintiff for all attorneys' fees and litigation expenses from the date his client's offer was rejected. He then moved the Court to direct the co-defendant's liability carrier to deposit the judgment payment into the registry of the Court, so that it could be disbursed first as payment of his fees and expenses. In response, the plaintiff filed a notice of appeal, which was still pending at press time.

On October 31, 2019, following a four-day, wrongful death jury trial in DeKalb State Court before Judge Al Wong, former GDLA Board member and Freeman Mathis & Gary partner **Wayne Melnick** and his partner, **Jennifer Adair**, obtained a complete defense verdict for their clients, Bicycle Ride Across Georgia, Inc. ("BRAG") and Franklin Johnson.

The case arose as a result of a bicycle accident that occurred on the last mile of the last day of a 400-mile, seven-day, cross-state organized bicycle ride. Plaintiff, a widower, alleged that his wife, a 30-year rider who averaged over 400 miles a month, put her front tire in a half-mile long expansion joint that ran parallel with traffic on East Bay Street in the Historic District of Savannah.

Plaintiff's claim for negligence was extinguished on summary judgment as a result of the waivers he and his wife executed to participate in the ride, but his claims that BRAG and Johnson were grossly negligent for their planning of the route and failure to specifically warn riders of the expansion joint hazard survived along with his claim for punitive damages.

The defense team argued that the route was safe and appropriate as evidenced by Savannah's permitting of the route, that no specific warning was required for such an open and obvious hazard, and that the decedent was not properly wearing her bicycle helmet which came off prior to her head's impact with the pavement. Plaintiff's counsel suggested to the jury that they should award over $21 million plus pre-death pain and suffering plus punitive damages.

Following testimony and argument, the jury took only 27 minutes to render a full defense verdict. Because Plaintiff rejected a Rule 68 offer of settlement during the pendency of the case, he is potentially liable for attorney's fees and litigation expenses from the date of rejection.

Leslie Becknell of **Drew Eckl & Farnham** in Atlanta and GDLA Treasurer **George R. Hall** of **Hull Barrett** in Augusta won a defense verdict for a national retailer and its loss prevention manager in a malicious prosecution/false arrest case in Richmond County State Court, Judge Patricia W. Booker presiding. Plaintiffs (two sisters) alleged they were falsely accused of shoplifting, arrested, and handcuffed in front of their three young children. They had no family in the area so they were forced to call the maintenance man at their apartment complex to pick up their children and keep them while they were in jail. They claimed that while they were in jail, their hands and feet were shackled, and they were forced to strip in public to change into jail-issued clothing. After they were released, they received a letter from the store demanding that they pay $150, even though the store kept the items in question. The criminal charges were eventually dismissed by the local solicitor. In their lawsuit, they claimed false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, and negligence. They sought damages for therapy for PTSD, lost wages, expenses related to the defense against the criminal charges, attorneys' fees, and punitive damages. The jury found in favor of one plaintiff but awarded her $0 in damages and apportioned 98 percent of the fault to that plaintiff. The jury awarded judgment in favor of the defendants on all claims asserted by the other plaintiff.

In another case, GDLA Treasurer **George R. Hall** and **Jordan T. Bell** of **Hull Barrett** in Augusta successfully defended a local car dealership and a national bank sued for revocation of acceptance, breach of warranty, violation of Georgia Fair Business Practice Act, and punitive damages. The case was tried in the Superior Court of Columbia County, Ga. The plaintiffs had purchased an expensive vehicle from the local dealership, which was financed by the bank. The plaintiffs alleged that the vehicle had been wrecked prior to being sold to them and was defective. The plaintiffs sought damages in excess of $100,000. The case was tried during the week of February 17, 2020. At the conclusion of the plaintiffs' case, the presiding judge granted a Motion for Directed Verdict on all claims for both defendants.

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

SHARE YOUR NEWS AND CASE WINS

Perhaps you've made partner, won an award, or been elected officer in another association. We also welcome news about defense wins. Remember our circulation includes all Georgia judges.

Email your good news to jward@gdla.org

Welcome, New GDLA Members!

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

Sara Alexandre
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GDLA Amicus Program Continues to Grow

Supreme Court Rules Change Impacts Timing of Briefs

GDLA is proud of its very robust *amicus curiae* program. In the last three years alone, 33 requests were vetted under the leadership of now Amicus Co-Chairs Emeritus Marty Levinson of Hawkins Parnell & Young in Atlanta and Garret W. Meader of Drew Eckl & Farnham in Brunswick.

In some instances—like *Hughes v. First Acceptance*—we filed more than one brief as the case progressed in the appellate process. In another case, *Woodard v. Grange*, Mr. Meader appeared and argued GDLA's position at the 11th Circuit. Most recently, the Supreme Court of Georgia asked GDLA to weigh in on whether Georgia's punitive damages statute violates our state's Constitution as to right to jury trial and separation of powers. At press time, GDLA had filed its *amicus* brief (see page 22) and Amicus Chair Elissa Haynes' participation in oral argument was postponed due to the coronavirus.

We have enjoyed several successes and are grateful to the many volunteers who have donated their time authoring briefs. GDLA's voice has been heard on a wide variety of issues since, including the following:

- Applicability and interpretation of the five-year statute of repose applicable to medical malpractice claims
- Enforceability of the rejection of uninsured motorist coverage
- Admissibility of the financial condition of a party's Chief Executive Officer for purposes of showing potential bias where no punitive damages claim was made
- Discoverability of cost and pricing in-formation charged by a hospital to patients other than plaintiff and the potential applicability of the collateral source rule
- Whether a plaintiff may add vicarious claims against a timely-sued corporate defendant based on acts of professional actor first criticized after the statute of limitations expires
- The distinction between ordinary and professional negligence in professional malpractice cases
- Requirements of a bad faith failure to settle a claim
- Whether evidence of a treating physician's contingent financial interest in the outcome of a trial violates the collateral source rule
- Charging the jury on assumption of the risk whether respondeat superior liability can attach when the employee's "negligent act" occurred outside of the course and scope of employment
- Negligent security and prior knowledge
- Judicial estoppel

We are now under the leadership of Amicus Chair Elissa Haynes of Drew Eckl & Farnham in Atlanta and Vice-Chairs Anne Kaufold-Wiggins of Balch & Bingham in Atlanta and Philip Thompson of Ellis Painter in Savannah.

Amicus requests should be sent to the new committee, explaining how the case impacts the civil defense bar and including any briefs, etc. Those requesting are expected to help source an author who must be GDLA member; authors receive no payment. The requestor must also say when his/her brief, petition, or application is due, since the Georgia Supreme Court recently amended its rules regarding the timing as noted below. For all cases that docketed after December 2, 2019:

- *Amicus* briefs in support of any party can be filed without leave of Court **within 10 days after the party GDLA intends to support's initial brief, petition, or application is due.**
- If it's after that 10-day period, **leave of court is required** and an Application for leave to file an *amicus* brief shall be filed in the form of a motion and shall attach the proposed *amicus* brief as Exhibit 1. After that time period, leave of court is required and an Application for leave to file an *amicus* brief must be filed in the form of a motion with the proposed brief attached as Exhibit 1.

See the pages that follow for articles on recent briefs. They are all available in the members area online. ◆

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GDLA Urges Supreme Court to Reinstate Jury's Verdict, Find Assumption of Risk Charge to Jury Was Appropriate

On October 30, 2019, GDLA filed an *amicus curiae* brief in the Supreme Court of Georgia in the case of *Daly v. Berryhill*, which primarily involves issues regarding assumption of the risk.

The case involves a plaintiff, Shane Berryhill, who fell from a tripod deer stand 18 feet above the ground when he decided to go hunting just five days after undergoing life-saving open heart surgery—despite instructions from the plaintiff's cardiologist, Dr. Daly, to avoid strenuous or risky activities for a week. Berryhill and his wife contended that he fell due to dizziness caused by medication prescribed to him by Dr. Daly and alleged that Dr. Daly was negligent in not warning Berryhill of the specific risk of fainting. Whether the medication caused Berryhill to faint was disputed at trial.

The case ultimately went to trial and the jury returned a verdict for the defendants, Dr. Daly and his practice. The plaintiffs appealed, and the Court of Appeals reversed the judgment on the jury's verdict, holding that the trial court had erred in charging the jury on assumption of the risk. Counsel for the defendant doctor and his practice requested GDLA's assistance at that point, and GDLA filed an earlier *amicus curiae* brief in the Supreme Court of Georgia in support of the defendants' petition for certiorari from the Court of Appeals' opinion.

In its brief, GDLA pointed out that there was evidence from which a jury could have found that Dr. Daly specifically instructed Berryhill and his wife that he "should have no strenuous exertion for a week, there should be no lifting, no bending over, no stooping over, and that the patient needed to be careful because he was on blood thinning medication." Based on that evidence, GDLA argued, the jury certainly could have found that Berryhill subjectively understood that he risked serious injury by going hunting and climbing 18 feet up to a deer stand just five days after his surgery. GDLA also argued that the jury could reasonably have found that the risk of engaging in such activities just a few days after life-saving open heart surgery was so objectively obvious that Berryhill was charged with knowledge of the risk of injury. GDLA argued that the trial court properly charged the jury on several different ways in which Berryhill might (or might not) be responsible for his own injuries and that the Court of Appeals erred in substituting its own interpretation of the facts for that of the jury.

The Supreme Court also asked the parties to brief the issue of whether the trial court properly gave a jury charge on avoidance of consequences. GDLA weighed in briefly on that issue as well, arguing that any claimed error on that charge wasn't properly preserved in the trial court or raised in the Supreme Court, but in any event, was appropriately given. Since Berryhill contended that Dr. Daly and his staff had given "confusing" instructions after the surgery, the jury also could have concluded that Berryhill failed to exercise ordinary care in not seeking clarification on those instructions.

GDLA's brief was written by Amicus Chair Emeritus Martin A. Levinson of Hawkins Parnell & Young in Atlanta. The case is *Dale P. Daly, M.D. and Savannah Cardiology, P.C. v. Shane H. Berryhill and Pamela S. Berryhill*, Supreme Court of Georgia, Case No. S19G0499.◆

Court of Appeals Holding Stands on Key Notice Question in Negligent Security Cases

On November 4, 2019, the Georgia Supreme Court, in a 9-0 decision, denied Appellant's Petition for Certiorari in *Bolton v. Golden Business*, in which GDLA had filed an *amicus* brief.

The case involved a shooting death in the parking lot of an Atlanta gas station. The trial court had previously granted summary judgment to the property owner on grounds that there was no evidence of the property owner's knowledge of prior substantially similar crime. The Georgia Court of Appeals unanimously affirmed the trial court's grant of summary judgment following oral argument in September 2018.

The appellate Opinion, which now serves as binding precedent, is a significant win for the defense bar for negligent security cases. Appellant was unsuccessful in her attempt to overrule *Suntrust v. Killebrew* and the Opinion once again affirms that property owners/occupiers have no affirmative duty to comb through police records to determine whether prior crime has occurred on their premises. Further, the case clarifies that there must be evidence of a property owner/occupier's actual knowledge of prior substantially similar crime or a propensity for crime to establish reasonable foreseeability of a third-party crime.

Plaintiffs cannot introduce prior police reports and crime grids as evidence of foreseeability unless they have evidence of Defendant's actual knowledge of the crimes included in those reports.

The case was defended at the trial court level by Elissa Haynes, who is now with Drew Eckl & Farnham in Atlanta, and Robert Luskin of Goodman McGuffey. Pete Law of Law & Moran was Plaintiff's counsel. Ms. Haynes served as lead counsel on appeal against Max Thelen of The Summerville Firm.

GDLA thanks Matthew Boyer of Nall & Miller, with assistance from then-Amicus Chair Emeritus Martin A. Levinson of Hawkins Parnell & Young, for volunteering their time to author our *amicus* brief. The case is *Bolton v. Golden Business, Inc.*, Court of Appeals, Case no. A18A1600.◆

GDLA Files Amicus Brief on Constitutionality of Punitive Damages Statute

Supreme Court of Georgia Invited GDLA's Input

On December 19, 2019, the Supreme Court of Georgia invited GDLA to express its views on whether O.C.G.A. § 51-12-5.1, Georgia's punitive damages statute, violates the provision of the Georgia Constitution protecting the right to a jury trial and providing for the separation of powers.

GDLA's Amicus Committee and Executive Committee accepted the Supreme Court's invitation to submit an *amicus* brief on behalf of the association. Amicus Chair Elissa Haynes of Drew Eckl & Farnham in Atlanta and Amicus Chair Emeritus Marty Levinson of Hawkins Parnell & Young in Atlanta teamed up to author the brief, which was filed on February 28, 2020.

The case, which was a direct appeal from state court, arose from a motor vehicle collision involving the plaintiff and a drunk driver. Plaintiff also sued a second defendant for negligent entrustment of the vehicle the drunk driver was operating. The case culminated in a bench trial with Plaintiff challenging the final judgment awarding $50,000 in punitive damages against the drunk driver, and no punitive damages as to the negligent entrustor. Plaintiff argued that the trial court misinterpreted the "active tortfeasor" limitation of O.C.G.A. § 51-12-5.1(f) and interpreted by the Georgia Court of Appeals in *Capp v. Carlito's Mexican Bar & Grill No. 1, Inc.*, 288 Ga. App. 779 (2007).

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

First, GDLA argued that *Capp* was correctly decided and that a reading of the plain language of subsections (f) and (g) of the punitive damages statute leads to the conclusion that a punitive damages award—whether capped or uncapped—cannot be assessed against a passive tortfeasor in cases involving an active tortfeasor defendant acting under the influence or with specific intent to harm. This interpretation is consistent with the General Assembly's intent in enacting subsection (f).

GDLA also argued that Georgia's punitive damages statute does not unconstitutionally infringe upon a plaintiff's right to trial by jury as our courts and courts around the country, including the U.S. Supreme Court, have held that the determination of damages, including punitive damages, is not a fact-finding function reserved for the jury. Plaintiff's separation of powers argument likewise fails as the legislature enjoys broad discretion in authorizing and limiting permissible punitive damages awards.

Ms. Haynes was scheduled to argue on behalf of GDLA at oral argument, orignally set for March 19, 2020 but postponed due to the coronavirus.

The case is *Alonzo Reid v. Lakenin Morris and Keith Stroud*, Supreme Court of Georgia, Case No. S20A0107. ◆

Supreme Court Grants Cert: Applicability of Judicial Estoppel Doctrine Where Plaintiff Amends Bankruptcy Schedule in Response to a Dispositive Motion

On February 28, 2020, the Georgia Supreme Court granted certiorari in a case in which GDLA had filed an *amicus curiae* brief. That brief, filed on December 23, 2019, was regarding the application of the judicial estoppel doctrine in a case where the trial court applied federal law in determining that the plaintiff had made a mockery of the court through her failure to disclose her claim in a contemporaneously pending bankruptcy proceeding.

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

In May 2013, the plaintiff filed a voluntary petition for Chapter 13 bankruptcy. While the petition was pending, the plaintiff allegedly objected to improper behavior on the part of one of the defendant Fulton County's commissioners. As a result, she alleged that she was demoted and faced other forms of retaliation. In August 2016, the plaintiff sent ante litem notice of her whistleblower claim to the defendant and thereafter filed a lawsuit in October 2016. On September 5, 2017, the defendant filed a motion for summary judgment, pertinently arguing that judicial estoppel barred the plaintiff's claim because she failed to disclose her cause of action against the defendant as an asset in her bankruptcy proceeding. The plaintiff then filed an amended bankruptcy schedule on October 2, 2017, in which she identified her cause of action against the County as an asset worth $1.00 despite asserting before the trial court that her claims total $3.0 million.

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

> *Before the trial court, the defendant argued that federal law applied and that under the recent Eleventh Circuit decision* Slater v. United States Steel Corp., *the defendant could not establish that plaintiff acted with intent to make a mockery of the judicial system.*

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

The defendant filed a petition for certiorari, and GDLA filed a brief in support of the defendant's petition to argue that the trial court acted properly in granting summary judgment. GDLA argued that Georgia case law recognizes judicial estoppel's nature as a federal doctrine and has routinely looked to federal law to inform application of that doctrine in Georgia courts. GDLA further argued that federal law, particularly in the Eleventh Circuit, imparts considerable discretion on trial courts to consider facts pertinent to the debtor's intent in failing to make the appropriate disclosure, regardless of whether the debtor amends her bankruptcy filings in response to a dispositive motion, and that the trial court properly exercised its discretion.

Accordingly, GDLA encouraged the Georgia Supreme Court to grant certiotari to encourage candor from litigants involved in contemporaneous bankruptcy proceedings at all times, not simply when potential deception is revealed in a dispositive motion. The Georgia Supreme Court did grant certiorari, indicating that the parties were to brief whether the trial court abused its discretion in applying the judicial estoppel doctrine.

The case is *Fulton County, Georgia v. Sandra Ward-Poag*, Georgia Supreme Court, Case No. S19C1619. We thank the brief's author and Amicus Committee Vice-Chair Philip Thompson of Ellis Painter in Savannah for his service to GDLA. ◆

GDLA Files Amicus Brief on Apportionment in Strict Liability Cases

On March 5, 2020, GDLA filed an *amicus* brief in the Supreme Court of Georgia expressing its views on the application of O.C.G.A. § 51-12-33(a), Georgia's apportionment statute, in strict products liability cases where the plaintiff is partially at fault.

The case arose from a motorcycle accident. Plaintiffs, a husband and wife, sued Defendants alleging defects in the husband's motorcycle. At trial, the jury awarded $10.5 million in compensatory damages and $2 million for a loss of consortium claim. However, the jury assessed 49 percent of the fault for the accident to the husband. The trial court, applying the apportionment statute, reduced Plaintiffs' damages award by that percentage, ultimately awarding $6.375 million to Plaintiffs.

Plaintiffs appealed, maintaining the trial court should not have applied the apportionment statute to their damages award because Defendants were found strictly liable. The Georgia Court of Appeals rejected their argument. Based on "the plain language of the statute in conjunction with [Georgia Supreme Court precedent]," the court concluded there was no error in reducing the Plaintiffs' damages award by their percentage of fault for the accident. The statute had "displace[d] the common law." *Suzuki Motor of Am., Inc. v. Johns*, 351 Ga. App. 186, 198 (2019).

The Supreme Court granted Plaintiffs' petition for certiorari on January 13, 2020. In their briefing, Plaintiffs contend applying the apportionment statute in strict liability cases will impermissibly "inject [ ] negligence into strict products liability law" and that it will eviscerate strict products liability. As GDLA pointed out in its brief, that is simply not the case.

> *GDLA argued assigning fault to a plaintiff is in full conformity with the General Assembly's intent in enacting the statute: to hold those responsible for an injury, in whatever way, responsible.*

Relying on recent decisions from the Georgia Supreme Court and the Court of Appeals applying the apportionment statute, GDLA argued assigning fault to a plaintiff does nothing to undermine strict liability. Simply because a manufacturer cannot rely on the reasonableness of its actions to avoid liability for harm caused by a defective product does not mean fault for the injury cannot be ascribed to other parties, including the plaintiff. GDLA also noted some consideration of a plaintiff's fault has always been part of strict liability cases, as shown by the universal acceptance of assumption of the risk as a defense to strict liability claims. The amendments to the apportionment statute, enacted in 2005, merely expanded that inquiry to cover all forms of a plaintiff's conduct that lead to injury, including a plaintiff's negligence.

Finally, GDLA argued assigning fault to a plaintiff is in full conformity with the General Assembly's intent in enacting the statute: to hold those responsible for an injury, in whatever way, responsible.

We thank the brief's authors, GDLA Secretary James D. "Dart" Meadows, Amicus Vice-Chair Anne Kaufold-Wiggins, Jim Hollis, and Patrick Silloway of Balch & Bingham in Atlanta

The case is *Adrian Johns and Gwen Johns v. Suzuki Motor Corporation and Suzuki Motor of America, Inc.*, Supreme Court of Georgia, Case No. S19G1478. A date for oral argument was still to be determined at press time. ◆

GDLA Files Amicus Brief on Georgia's Street Gang Terrorism and Prevention Act

On March 6, 2020, GDLA filed an *amicus* brief in the Georgia Court of Appeals in a case involving a civil claim under the Georgia Street Gang Terrorism and Prevention Act (GSGTPA). The issue is whether such a claim may be brought against property owners and occupiers on whose premises a gang-related crime occurs, or just against the gang member(s) who committed the crime.

The case involves a May 29, 2017 shooting of Plaintiff as he was attempting to enter his apartment and Defendants' apartment complex. Plaintiff alleges that defendants, the owner and property management company, failed to provide adequate security for the tenants. He asserted claims for (1) negligent security under O.C.G.A. § 51-3-1, (2) nuisance under the GSGTPA, (3) negligence per se based on a violation of the City of Brookhaven's nuisance ordinance, and (4) negligence per se based on a violation of DeKalb County's nuisance ordinance. Defendants filed a motion to dismiss as to the nuisance and negligence per se claims. Judge Dax Lopez of the State Court of DeKalb County denied the motion but granted a certificate of immediate review. The Georgia Court of Appeals then granted Defendants' application for interlocutory appeal.

The GSGTPA was enacted in 1992 and amended in 1998 to, among other things, create a civil cause of action in favor of "any person who is injured by reason of criminal gang activity." This civil cause of action went unused for almost 20 years, but recently plaintiffs began asserting nuisance claims based on this provision. The reason? The statute allows a plaintiff to recover treble actual damages.

Defendants argued that plaintiff's nuisance claim under the GSGTPA was invalid because the only proper defendant for such a claim is the gang member who committed the crime at issue. Judge Lopez disagreed and found that the statute applies to property owners and occupiers on whose premises a gang-related crime occurs. In so holding, Judge Lopez became only the second judge in the state to interpret the statute in this manner. In contrast, five other judges have found that property owners and occupiers cannot be sued under this statute.

This case is important because it is the first case that will be decided by an appellate court in Georgia on the scope of the civil cause of action in the GSGTPA. And because the statute allows for the recovery of treble actual damages, as well as punitive damages, the outcome of this case is critical for clients of GDLA's members. As a result, GDLA decided to submit an *amicus* brief setting forth its view on how the civil cause of action in the GSGTPA should be interpreted.

In GDLA's view, the plain language of the statute, as well as the codified statement of intent and the overall context of the GSGTPA, show that the General Assembly's intent was to eradicate criminal gang activity by punishing criminal street gangs. For example, the act provides for the forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by criminal street gangs. Nowhere in the act did the General Assembly indicate that its intent was to eradicate criminal gang activity by punishing property owners who are unable to prevent gang members from coming on to their property and committing crimes. Moreover, this would be impractical because it would be exceedingly difficult for management employees to know whether a person is a member of a gang just by looking at him or her.

GDLA also argued that other canons of statutory construction support its interpretation of the statute. For example, the canon of constitutional doubt or avoidance requires courts to construe statutes to avoid serious constitutional questions. Allowing property owners and occupiers to be sued under the GSGTPA would raise serious constitutional questions regarding (1) the civil forfeiture provisions in the act and in the Georgia Uniform Civil Forfeiture Procedure Act, (2) the due process rights of defendants and others, (3) the prohibition on excessive fines, and (4) the imposition of vicarious criminal liability.

Further, statutes may not be interpreted in a way that leads to absurd or unreasonable results. As interpreted by Judge Lopez, the statute that creates the civil cause of action is unconstitutionally vague, and so that interpretation should be avoided on the ground that an unconstitutional interpretation is absurd and unreasonable.

Thanks goes to Jake Daly of Freeman Mathis & Gary in Atlanta who authored the brief. The case is *Star Residential, LLC v. Hernandez*, Court of Appeals Case No. A19A2267. ◆

Court of Appeals Sides with GDLA Amicus Brief on Application of Voluntary Undertaking Doctrine in a Third-Party Criminal Attack Case

On March 13, 2020, the Georgia Court of Appeals issued an opinion siding with an *amicus* brief filed by GDLA on October 11, 2019. The case was regarding the application of the voluntary undertaking doctrine to a random, unforeseeable third-party criminal attack that occurred approximately one mile away from the defendant's premises.

The primary issue addressed was whether the defendant, a residential rehabilitation program, had any duty to the plaintiff, who was sexually assaulted when she deviated from the program's rules by walking away from a designated area to conduct a personal errand. At the time of the attack, the plaintiff had agreed to complete defendant's residential drug rehabilitation program in lieu of prison confinement. Part of the program's rules required the plaintiff to maintain employment.

On the day of the attack, the plaintiff walked from the defendant's facility to a nearby bus stop in order to take a bus to and from her work. The plaintiff missed her bus, and instead of waiting at the bus stop for the next bus, the plaintiff deviated from the program's rule by walking some distance to a convenience store for a personal errand and was subsequently attacked.

At the trial court level, the plaintiff argued that the defendant voluntarily undertook "a duty of protection" for her in consideration for "the fees and costs paid" by the plaintiff's earnings from her required employment. In denying summary judgment, the trial court relied on the holding of *Martin v. Six Flags Over Ga. II, L.P.* 301 Ga. 323 (2017) to exponentially enlarge the potential liability of property and/or business owners for criminal attacks. Additionally, in opposing summary judgment, the plaintiff introduced evidence that after the incident, the defendant had established a "buddy system" for its residents when walking to bus stations.

GDLA filed its brief to argue that the trial court erred in denying summary judgment. The issues raised in this appeal will affect every institutional facility in the state, including schools, churches, hospitals, nursing homes, and rehabilitation institutions, and should the trial court's decision be allowed to stand, property owners or operators will necessarily become the insurers of their clients'/patients' safety, whether on their premises or a mile away from their premises, or whether carrying out personal errands in violation of the facility's rules.

First, GDLA argued that the trial court erred in failing to make a ruling on whether the defendant owed a duty to the plaintiff, which is a question of law that the trial court should have decided. Second, GDLA argued that the defendant did not voluntarily undertake a duty of protection to ensure the safety of the plaintiff at all times and at all places. In this regard, GDLA argued the plaintiff could not have relied on the defendant for security services where the subject incident occurred because the plaintiff knew that she was in an area where she was not allowed to go, and further, the defendant did nothing to increase the risk of harm to the plaintiff.

The plaintiff did not bring a premises liability claim, but to the extent she argued that her claim "sounded in premises liability," any premises liability claim likewise failed because there was no evidence in the record that the defendant owed a duty to the plaintiff under O.C.G.A §51-3-1. The Defendant had no duty to keep safe "approaches" over which it had no control, much less an area one mile away.

Further, the attack on the plaintiff was entirely unforeseeable. GDLA claimed that the *Six Flags* holding relied upon by the trial court should have been strictly limited to that case's specific facts which showed the criminal attack that caused the patron's injuries began when both the patron and the assailants were on Six Flags' property and should not be expanded to allow liability for criminal attacks which do not take place on a defendant's property or approaches or when a plaintiff deviates from protocols or procedures.

Contrary to the plaintiff's contention, GDLA argued that no duty was created through the existence of a "special relationship" between the parties. Likewise, GDLA argued against subsequent remedial measures being introduced for the purpose of establishing negligence against a defendant.

Finally, GDLA argued that, pretermitting whether the plaintiff presented sufficient evidence of a duty and a breach to overcome summary judgment, the criminal assailant was the proximate cause of the plaintiff's claimed damages, superseding any negligence of the defendant.

We thank the brief's co-authors, Sandra V. Foster and GDLA Board member Tracie Macke of Brennan Wasden & Painter in Savannah for their service to GDLA. The case is *St. Jude's Recovery Center, Inc. v. Laura Vaughn*, Georgia Court of Appeals, Case No. A19A2438.◆

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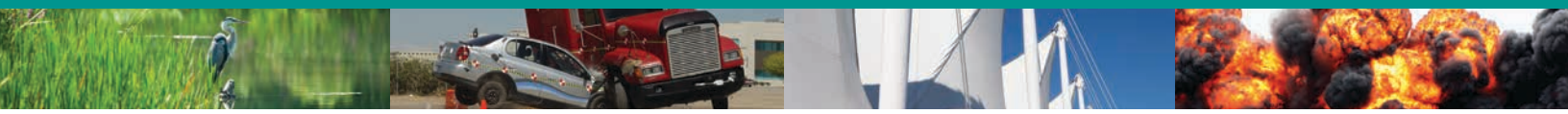

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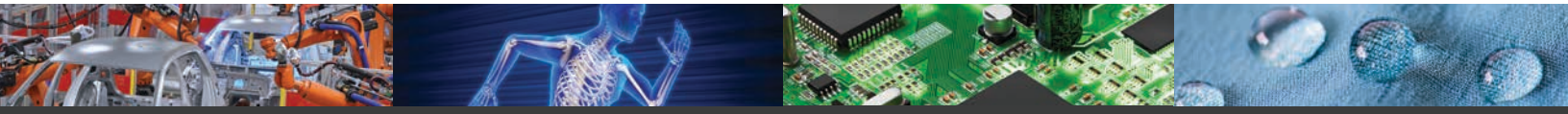

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So-Called "Treating Physicians" and The Catch-22 of Rule 26(a)(2)

By Zach M. Matthews
McMickle Kurey & Branch, Alpharetta

Federal Rule 26(a)(2) is familiar to many litigators as the rule governing expert witness disclosures. The rule has two important subparts: Rule 26(a)(2)(B) (the "classic" expert witness disclosure rule), and Rule 26(a)(2)(C) (the "abrogated" expert witness disclosure rule).

Rule 26(a)(2)(C) was amended in 2010 specifically to capture the elusive category of "treating physician." Under a straightforward reading of the rules, a treating physician is only required to make a bare-bones disclosure under Rule 26(a)(2)(C), not the full-fledged classic expert disclosures of Rule 26(a)(2)(B). Among other things, this means a "treating physician" doesn't need to reveal his or her past history of testimony, with a look-back period of four years. The treating physician also does not have to prepare a written expert report. Most notably, the treating physician gets to avoid being characterized as a "retained expert," with all of the trial baggage that term carries.

In recent years in many markets, especially in venues such as Georgia, Florida, New Mexico, Texas and California, the defense bar has seen a rapid onslaught of litigation-funded medical treatment. This business model involves doctors who market heavily to plaintiffs' lawyers and chiropractors so as to gather as many patients as possible. These patients typically have third party litigation claims (either work comp or general liability), which allow the doctor to bill at the so-called "self-pay" or "100% Chargemaster" rate rather than at a lower, negotiated medical insurer's rate. Because these patients are not being treated pursuant to a medical insurance policy, when the patients' cases go to trial, their counsel are able in many cases to blackboard medical expenses that far exceed market averages for similar treatment by more conventional doctors. In this way, the litigation-funded treating physician is able to maximize his billing capacity, avoid the hassle of insurance write-downs, and recover an overall fee that may be two to three times that of his similarly-situated peers, who are not involved in this litigation-focused business model. Of course, that means a third-party work comp or liability insurer ends up paying two to three times more for the plaintiff's medical care than the patient otherwise could have received-thus inflating the total verdict value and enriching plaintiff, doctor, and plaintiffs' counsel at the expense of a fair system.

As defense counsel, confronting the "litigation-funded doctor" can be tricky; after all, this person will testify in a white coat and will claim to have no interest in the case other than in making sure the patient gets better. However, there's a catch.

In federal court (and in many circumstances in state courts as well), a jury is not allowed to consider medical treatment unless an expert witness has provided a "causation opinion," linking the treatment rendered to the allegedly-negligent acts of the defendant(s). The only exception is where the injury is so obviously connected to the defendants' negligence that a layperson could understand it without needing expert help. So, a broken bone received from a car wreck, or a gunshot wound received due to allegedly negligent security, would not require an expert to demonstrate the causal link. Those cases tend to be far less common than orthopedic or "neck-and-back" cases, which often involve overlapping issues of degenerative change, pre-existing conditions, and potential exacerbation. As a rule of thumb, in a "neck-and-back" case, a causation opinion is required before the treatment can properly reach the jury. If a plaintiff fails to secure such an opinion, the treatment and the plaintiff's medical expenses/damages may be subject to exclusion on a motion for partial summary judgment, which can hollow out a neck-and-back Plaintiff's case.

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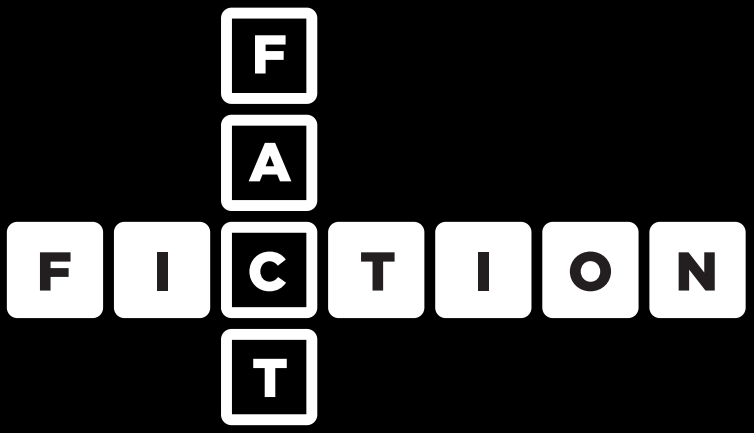

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Can a Driver's Expectation of a Hazard be More Important than the Visibility of a Hazard?

By J. Jay Todd, Ph.D.
Rimkus Consulting

When discussing expectancy while performing a task, most people think about the temporal effect: People are generally faster and more accurate when reacting to an expected than an unexpected event. When we surprise someone, that person will need more time to react to our actions. This is because their expectations about our behavior have been challenged and they must reassess the situation in order to respond strategically and not in a reflexive manner. This is why, regardless of whether we are performing in war, litigation, or a game of baseball, we like to "keep our cards close." We want to surprise our opponents, so they have a limited amount of time to respond optimally to our surprise attack.

This influence of expectation (or lack thereof) on our behavior is familiar and apparent. However, there is a less apparent side to expectation that is not commonly addressed: an unexpected, yet visible, object can pass by undetected, even when that object is relevant to the task at hand.

Our mind frequently and purposefully selects only a small amount of the visual information that is available in the world for in-depth processes. Because of this, we strategically seek out information and act in an intentional manner. In other words, we pursue goals because we cannot see and do everything at once. For example, when speaking or texting on a cellphone, we can successfully negotiate unexpected objects that are present along our path because that is a goal of walking, but we may not be aware of what we negotiated, or

even that we moved around something unexpected or unusual, even though the object was visible (e.g., a clown on a unicycle crossing the path of someone speaking on his cellphone) or rewarding (e.g., money hanging from a tree branch in the path of someone texting on his cell phone) (Hyman et al. 2010; Hyman et al. 2014). Unexpected objects appearing directly in front of people's focus of gaze for several seconds can also pass by undetected (Neisser & Brecklen, 1975; Simons & Chabris, 1999). Removal of a task that occupies our attention, e.g., talking on a cellphone, substantially increases the likelihood of us becoming aware of the unexpected object or event.

Focusing on a task can limit how many task-irrelevant events we are aware of. It is reasonable to question how a driver cannot be aware of an unexpected object positioned directly in his path that was visible, relevant to the task of driving safely, and arguably avoidable. This is a common issue investigated in the field of human factors. However, before it can be answered, it is important to understand what enables us to be aware of the unexpected. There are two factors to consider when investigating this. The first one is similarity. When searching for a specific object, e.g., a silver car in a parking lot, our attention is drawn to irrelevant objects with similar features to the target object, e.g., we may look toward silver pickup trucks and white cars that are clearly not silver cars. These "distractors" have features that are the same (*silver* pickup truck) or similar (white *car*) to those of the target object that we are searching for (silver car). The more similar something is to what we are looking for, or thinking about, the more likely we are of becoming aware of it (Most et al., 2001). The converse is also true: the less similar some-

Continued on page 56

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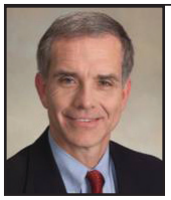


Impediments to Settle at Mediation

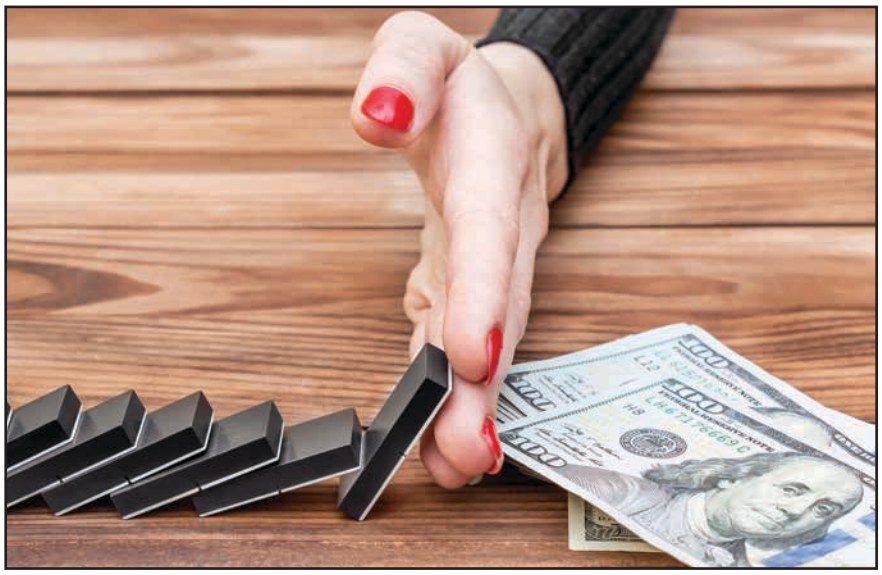
By Bruce Barrickman
BAY Mediation & Arbitration Services

Mediation is a great process for resolving personal injury and wrongful death claims, but there are several specific impediments and many general impediments to a successful resolution of claims. In this article, we will identify those impediments, deal with some of them in detail and bring others to your attention so you will be aware of those impediments and can become more familiar with how to address those impediments. This article will not cover all the impediments to settlement in detail, but hopefully it will help you in your preparations for settlement negotiations. We will address the following:

- Medicare Mandatory Insurer Reporting;
- Medicare liens;
- Medicaid liens;
- Medical liens;
- Apportionment, contribution and indemnity issues;
- Child support liens;
- Health insurance carriers rights of reimbursement and subrogation rights and ERISA plans;
- Assignments to medical providers of proceeds of the settlement and/or verdict in a lawsuit; and
- Lawsuit loans.

Some of the general impediments to resolution of any type of lawsuit or claim will also be discussed. Those impediments include:

- Plaintiff reports significantly more specials at start of mediation;
- Party has not provided important information or is not willing to reveal it;
- One or both of the parties threaten to leave early in the mediation;



- One of the parties is making unreasonable moves which potentially could end the mediation.
- Claim by insured against their uninsured motorist carrier;
- Plaintiff starts at higher number or defendant starts at lower number than pre-mediation;
- Defendants have undervalued their case;
- Find out that true decision maker or significant influence not present; and
- Spouse plaintiffs have different views of case;

In recent years, due to mandatory insurer reporting requirements, insurance carriers have become much more concerned about Medicare issues. Mandatory insurer reporting requirements mandate that group health insurance carriers, liability insurance carriers, worker's compensation insurance carriers and self-insured and self-administered liability entities report to the Center for Medicare and Medicaid Services (CMS) claims any settlements that may affect Medicare's position as a secondary payer. Reporting is required when:

- Mandatory Insurer Reporting and Liability Settlement Allocation Plans;
- Plaintiff or Claimant is 65 years old or older;
- Plaintiff or Claimant receives Medicare benefits;
- Plaintiff or Claimant is reasonably anticipated to receive Medicare benefits within the next 30 months after settlement or verdict; and
- Plaintiff or Claimant has end stage renal disease.

Some conditions or circumstances that should be considered in determining whether the settlement or verdict should be reported to CMS are:

- Plaintiff or Claimant is 62 1/2 years old or older;
- Plaintiff or Claimant has been receiving Social Security Disability benefits for two years or longer;

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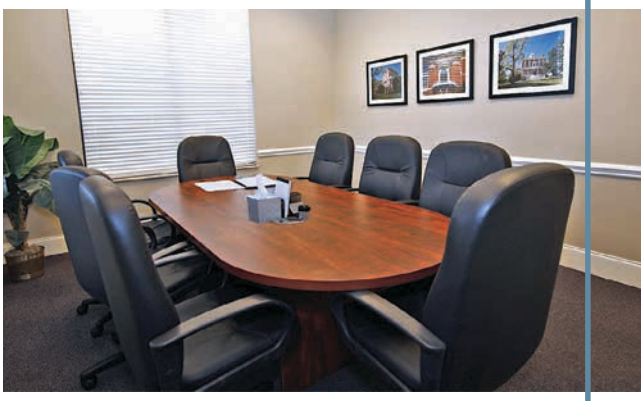

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Lemonade, Drones and Cyber Business Interruption

By Kyle Aldridge (left) and Chris Frederick Bennett Thrasher

I am sure this headline has you thinking, what do a nice summer drink, a low humming sound and an insurance policy have in common? Absolutely nothing, but in this article, we'll see how all three are changing the age-old insurance industry on a daily basis.

While we Southerners enjoy a fresh squeezed glass of lemonade during our hot summers, there is another type of lemonade that is disrupting the personal lines insurance industry. Lemonade (yes, that's the company name) is a Property & Casualty carrier founded in New York in 2015 that serves the renters and homeowners market. They are currently writing policies in eleven states and have plans to roll out nationwide.

What differentiates Lemonade from 'traditional' carriers? There are many differences, but it is their technology that is truly changing the marketplace. Lemonade coverage is purchased through an iOS /Android app on your smartphone or through their company website. While e-commerce purchasing is not new, what Lemonade is doing with claims technology is fascinating and has the potential to disrupt the industry. When policyholders need to submit a new claim, it is as simple as opening the app and pressing the claim button. Lemonade is using smartphones to quickly receive and process claims and the associated payments to the insured. Additionally, Lemonade uses the camera and video feature of a smartphone to have their policyholders record a short video to assist in handling the claim. This short video gives the insured a chance to tell in their own words the important facts of the claim.

Lemonade also uses artificial intelligence in the form of chatbots and machine learning to provide coverage and pay claims. This greatly reduces their overhead and reduces the time to bind the policy as well as pay the claim. In 2016, a customer filed a claim for a stolen coat and A.I. Jim (Lemonade's chatbot) reviewed, approved and paid the claim in three seconds - a new world record!

While Lemonade is a fresh new drink in the personal lines industry, drones are changing the speed and efficiency for commercial insurance adjusters in handling their claims. Patrick Gee, Senior Vice President of Auto, Property and Catastrophe Claims at Travelers, states "We see the drones as really another technology tool in the quiver of our claim professionals."

BetterView, an insurance technology startup that captures and analyzes data from drones, stated in April 2017 that it has performed more than 6,000 roof top inspections for insurers since its inception in 2015. BetterView also shared, "While 2016 was a big year for testing drones, we have seen insurers allocate budget dollars in 2017 to move from concept to real production use, and in 2018 we expect to see a significant ramp up in the use of drones by insurers and reinsurers."

For claim adjusters, drone benefits are two-fold: efficiency and safety. Drones have the ability to survey damage in real time and photos can be sent to smartphones, tablets or other electronic devices. From a safety standpoint, drones can be used to inspect very high or complex roofs. Previously, an adjuster may have come out, inspected a roof and either had to schedule a second visit where he brought the appropriate machinery to get on a roof or had to schedule a third party to inspect. With a drone, on the first visit the drone can fly and inspect the roof, further increasing the efficiency of the claim process.

There are still challenges to overcome with drones in the industry. First, there is a shortage of qualified and licensed drone operators. In a speech at the most recent Loss Executives Association meeting, panelists mentioned that drone technology was being used during the 2017 Hurricane season; however, finding licensed operators served as a bottleneck. Other issues with drones revolve around FAA and TSA regulations such as where you can fly, buffer zones and how close to individuals you plan on flying.

Even with the speedbumps in the short-term that are mentioned above, it is evident that drones have the ability to assist adjusters with their efficiency and safety while continuing to provide the same or better service to the insured.

While Lemonade and drones are new technologies that are creating ripples in the industry, cyber business interruption has become front and center due to the increased use of technology in our personal and pro-

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- Business Interruption & Extra Expense
- Property Damage
- Lost Profits
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Forensic Engineering Study of the Dismasting of a Sailing Superyacht

By Roy Crooks, Ph.D., P.E., and
Walter S. Laird, PE, CMI, IAAI-CFI, CVFI,
Forcon International

A dismasting is the failure of at least one of the masts of a sailing ship. Dismastings may be due to either failures in the rigging (which stabilizes and reinforces the mast under sail) or due to some weakness in the mast itself. At great distances from shore, a dismasting of an ocean-going yacht could be disastrous. The subject vessel was originally built in 1983 and it was remodeled in 2001 as a 157 foot long (overall) three-masted staysail schooner.

Figure 1. The three-masted staysail schooner Arabella.

In 2016, while under sail along the Virginia coast, the original foremast failed, and the ship was taken to Cape Charles, VA, for repairs.

Figure 2. The schooner docked at Cape Charles after the dismasting.

The 100-foot tall aluminum alloy foremast failed in two places. There were no witnesses to describe the sequence of the failure, which occurred with buckling at fifty feet above the base and by separation sixteen feet below the buckling. Forcon conducted a forensic examination to determine the sequence and cause of the failure.

The mast was removed from the ship for analysis. There was no apparent damage to the rigging which could have caused instability of the mast.

Figure 3. The foremast after removal. Sections were cut from the mast. Dimensions of the 6061 aluminum alloy mast were 15" overall diameter with a 0.325" wall thickness.

The lower failure showed only an overload fracture of the mast.

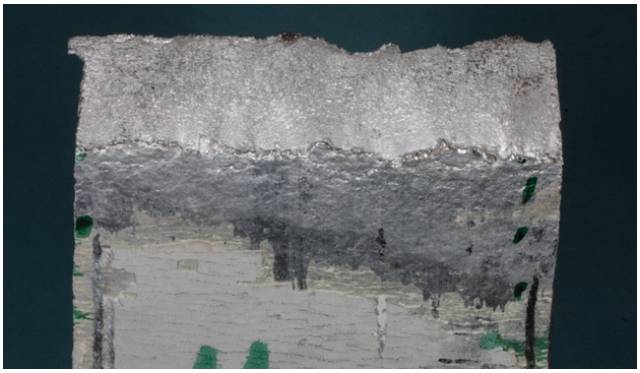

Figure 4. Macrophotograph of the lower fracture of the foremast, showing shear overload. There was no obvious indication of material defect or aggressive corrosion effects.

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SETTLING CASES CAN BE DIFFICULT

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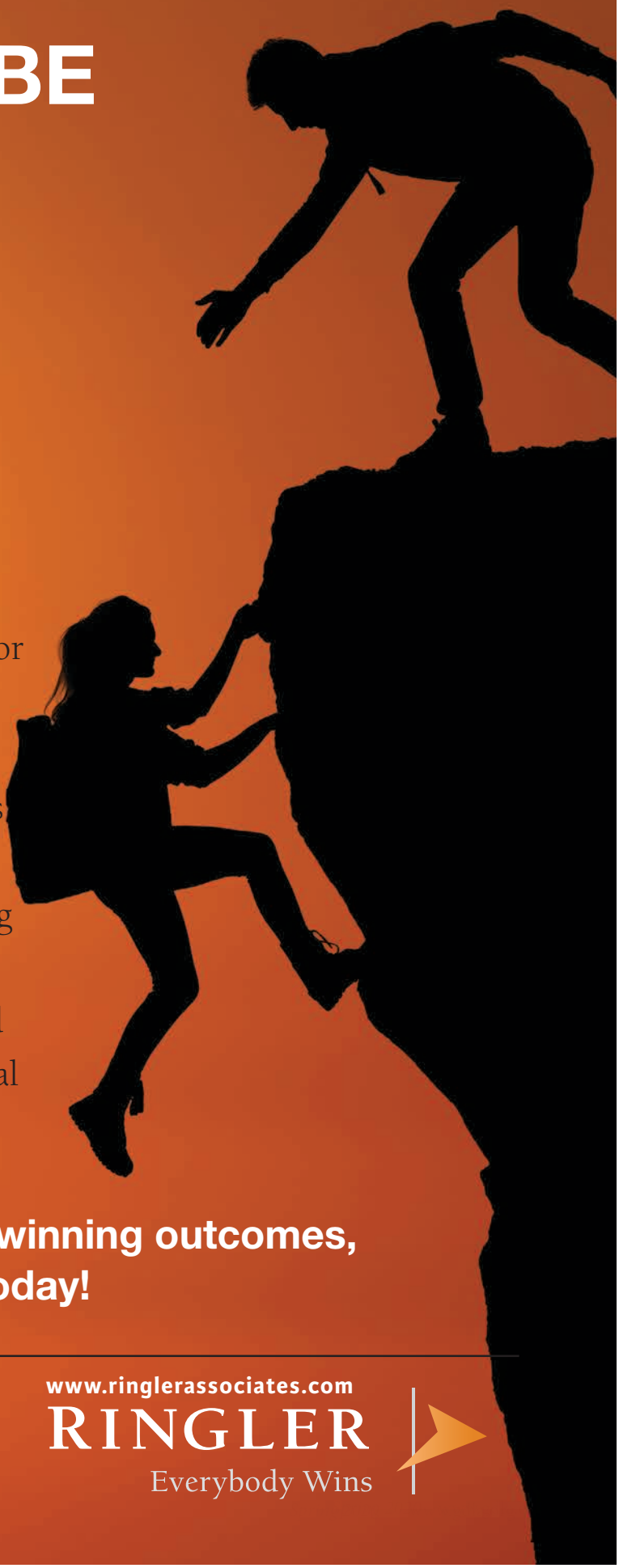

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OSHA's Spread the Liability Regulation Update

Fall Protection for Buildings: Usage, Responsibilities, and Risk

By Robert N. Kenney, P.E. and Nila Abubakar, P.E.

ESi (Engineering Systems, Inc.)

OSHA's recent "at-height" work protection rule, 29 CFR 1926.501 states that it is not just the Contractor that is liable for worker fall risk. Building Owners also are liable for providing safe "at-height" work protection.

The construction industry represents the largest amount of fatality work by volume and rate (Bureau of Labor and Statistics, 2015 data). Fall risks are present everywhere, especially since we are all affected by gravity. Falls account for 40% of construction fatalities. To provide appropriate fall protection, it helps to evaluate usage, responsibilities and risks from the perspective of hazard preventative measures.

Fall Protection

Hazards and required fall protection can be evaluated based on a hierarchy of fall protection. This hierarchy helps determine what equipment may be necessary to complete a task as well as provide direction on associated risks. The hierarchy ranks fall protection from no risk, to limited risk, to high risk.

1. Hazard/Fall Elimination—This is the ideal method for fall protection. By eliminating the need to do work at height, the fall risk is eliminated. Work can be performed from the ground utilizing drones, telephoto lenses or equipment affixed to an extendable pole.

2. Passive Fall Protection—Separates the worker from a fall risk or hazard by use of hole covers or the use of Guardrail systems.

Examples of guardrails:

Guardrail (during construction)

Guardrail / Handrail

3. Fall Restraint—If hazards cannot be eliminated for the worker, a fall restraint that includes securing a worker to an anchorage with a tether could be used to reduce the possibility of a worker falling over a free edge. Work that is routinely performed with predictable paths, such as gutter maintenance, benefits from this sort of fall protection. It is also required per OSHA 1910.28: The employer must ensure that each employee on a walking-working surface with an unprotected side or edge that is 4 feet or more above a lower level is protected from falling by one or more of the following—Guardrail systems; Safety net systems; or Personal fall protection systems, such as personal fall arrest (PFAS), travel restraint or positioning system.

4. Fall Arrest—Often used interchangeably with fall restraint, fall arrest systems differ in that they allow freedom of movement to perform activities. In the event of a fall, fall arrest systems safely stop a falling individual before they come into contact with the ground or surface below. An anchorage for fall arrest, positioning, restraint, or rescue systems must be capable of supporting the potential fall forces that could be encountered during a fall. For fall arrest systems to be certified, the minimum design force considered to be a static load is equal to 5,000 pounds or 2x (i.e. twice) the maximum arresting force. These tie-off points must be "certified" by a registered professional engineer or other "qualified" person as defined below. Alternatively, a non-certified anchorage can be determined by a competent person.

One key addition is that a tethered system must also have a separate fall arrest line. Thus, a "certified" building davit for a typical swing stage or swing chair will need to have a certified davit or tie-off anchor and a separate "certified" fall arrest line tie-off point directly connected to the individual(s) on the swing stage or chair.

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

Premises Liability Case Law Update

By Brian W. Johnson
Drew Eckl & Farnham, Atlanta

SPECULATION AND IMPROPER INFERENCE CANNOT SUPPORT EVIDENCE OF HAZARDOUS CONDITION

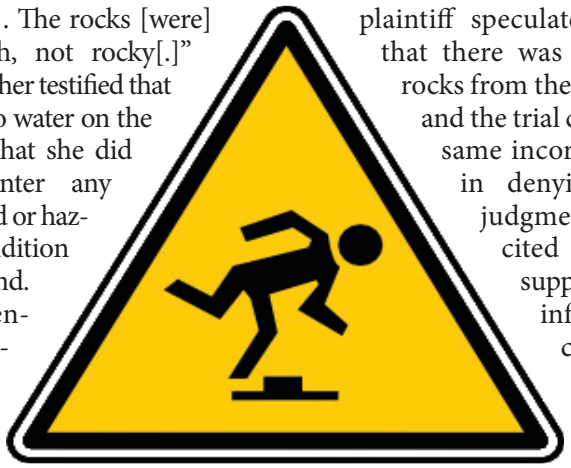
***First Communities Management, Inc. v. Karyn Holmes*, 2020 WL 103273 (A19A1829, Georgia Court of Appeals, 1/9/2020)**

Plaintiff claimed significant injuries and damages after she slipped and fell on or about October 23, 2015 while stepping up from a parking lot area onto a curb in the car cleaning area of an apartment complex where plaintiff resided. Plaintiff was attempting to use a vacuum that was surrounded by embedded rocks in a landscaped area. She sued the management company for the apartment community alleging that she slipped on a foreign substance or that the static condition rocks in the landscaped area were hazardous.

The trial court denied the defendant management company's summary judgment motion The Court of Appeals reversed because plaintiff's speculation as to evidence of a hazard was controverted by the evidence. Plaintiff testified in a deposition that she was unaware of what caused her to fall:

> Q: Do you know what caused you to fall backwards?
> A: No, I don't. . . .
> Q: You're not sure what caused your foot to slip?
> A: No, I'm not. . . .
> Q: Is that your testimony, Ms. Holmes, that you don't know what caused you to fall?
> A: That's correct.

When plaintiff's own attorney later asked her opinion about why she fell, plaintiff responded: "The rocks were real slippery. It wasn't the rough kind of rocks. . . . The rocks [were] just smooth, not rocky[.]" Plaintiff further testified that there was no water on the rocks and that she did not encounter any type of liquid or hazardous condition on the ground.



The defendant management company moved for summary judgment, arguing that there was no evidence of any hazardous condition that caused the plaintiff to fall. The trial court denied the motion, concluding that a jury could infer from other evidence that the rocks were slippery from a nearby car wash facility. The trial court granted a certificate of immediate review and the Court of Appeals accepted the application for interlocutory appeal.

The defendant management company argued, and the Court of Appeals agreed, that the trial court erred because there was no evidence of a substantial element of a slip-and-fall claim, namely, that there was a hazardous condition on the premises.

The threshold point of our inquiry in a slip and fall case is the existence of a hazardous condition on the premises. And it is well established that proof of a fall, without more, does not create liability on the part of a proprietor or landowner, because it is common knowledge that people fall on the best of sidewalks and floors.

The plaintiff failed to offer any evidence that the embedded rocks in the landscaped area near the vacuum were wet and constituted a hazardous condition. Although plaintiff speculated on appeal that there was water on the rocks from the car wash area, and the trial court made the same incorrect inference in denying summary judgment, plaintiff cited no evidence supporting such an inference. On the contrary, as set out above, the plaintiff specifically testified that there was no water or liquid on the rocks and that she did not encounter a hazardous condition on the ground.

Accordingly, because the plaintiff could not show the existence of a hazardous condition, she could not prove the cause of her injuries and there can be no recovery because an essential element of negligence cannot be proven. *See Taylor v. Thunderbird Lanes, LLC,* 324 Ga. App. 167, 169, 748 S.E.2d 308 (2011) (Summary judgment affirmed for the defendant premises operator as the plaintiff only offered conjecture as to the cause of her fall); *H.J. Wings & Things v. Goodman,* 320 Ga. App. 54, 56, 739 S.E.2d 64 (2013); *Willingham Loan & Realty Co. v. Washington,* 311 Ga. App. 535, 536, 716 S.E.2d 585 (2011) (holding that plaintiff failed to show the existence of a hazardous condition on the exterior staircase of her apartment complex, even though there was an accumulation of ice and plaintiff previously complained about loose steps, because plaintiff did not know specifically what caused her fall); *Glynn–Brunswick Mem'l Hosp. Auth. v. Benton*, 303 Ga. App. 305, 307, 693 S.E.2d 566 (2010)(reversing denial

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Products Liability Case Law Update

By James L. Hollis, Section Chair
Balch & Bingham, Atlanta

GEORGIA APPORTIONMENT STATUTE; PRODUCTS LIABILITY CLAIM BASED UPON STRICT LIABILITY: Trial court apportioned damages awarded in a strict products liability case in accordance with the fault attributed to each party. The Court of Appeals affirmed the trial court's apportionment of damages pursuant to O.C.G.A. § 51-12-33. The Court held the plain meaning of the Georgia apportionment statute in conjunction with the holding in *Couch v. Red Roof Inns*, 729 S.E.2d 378 (Ga. 2012), support the trial court's decision to apportion the damages awarded in a strict products liability case.

***Suzuki Motor of America, Inc. v. Johns*, 830 S.E.2d 549 (Ga. Ct. App. 2019).**

Motorcyclist Adrian Johns ("Johns") and his wife brought strict liability claims against Suzuki Motor of America, Inc. and Suzuki Motor Corporation (collectively "Suzuki"), alleging that a defect in the front brakes of his Suzuki motorcycle caused him to crash and sustain injuries.

Johns advanced three theories: (1) strict liability based upon a design defect; (2) negligent failure to warn; and (3) negligent recall, seeking compensatory and punitive damages. The jury found in favor of Plaintiffs, awarding Johns $10.5 million in compensatory damages, $2 million on his wife's loss of consortium claim but not awarding punitive damages. The jury apportioned fault as follows: (a) 49% fault to Johns; (b) 45% fault to Suzuki Motor Corporation; and (c) 6% fault to Suzuki Motor of America, Inc. Pursuant to O.C.G.A. § 51-12-33, the trial court apportioned the damages award in accordance with the fault attributed to each party. Suzuki filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Both motions were denied. On cross-appeal, Johns argued the trial court erred by apportioning the jury's award of damages in accordance with the fault attributed to each party in a strict liability case.

The Georgia Court of Appeals affirmed the trial court's apportionment of damages pursuant to O.C.G.A. § 51-12-33.

Johns argued the apportionment statute does not apply to awards based on strict liability. Johns cited the common law principle that a plaintiff's negligence is not a defense to a products liability claim based upon strict liability. The Court of Appeals held the trial court did not err in apportioning damages given the plain language of Georgia's apportionment statute and the Georgia Supreme Court's decision in *Couch v. Red Roof Inns, Inc.*, 729 S.E.2d 378 (Ga. 2012). First, the Court explained that by its plain terms, the Georgia apportionment statute is applicable in actions "for injury to person," without any distinction between the theories upon which those claims are based. Instead, the statute "directs a trial court to reduce the amount of damages awarded to the plaintiff by the jury in proportion to his or her percentage of fault, but notably does not refer to plaintiff's negligence." Thus, the Court of Appeals held the statute's reference to "fault" includes not only negligence, but also other types of wrongdoings, including strict liability.

The Court also considered the Supreme Court's opinion in *Couch v. Red Roof Inns, Inc*. In *Couch*, the Georgia Supreme Court held that fault could be apportioned to a criminal assailant despite the long-standing common law rule against apportionment to intentional tort-feasors. In *Couch*, the Court held that if the legislature had intended to exclude acts from the apportionment statute, it would have done so. In *Johns,* the Court of Appeals noted that the Georgia apportionment statute similarly did not exclude strict liability claims. Consequently, Johns' argument that comparative negligence is not a defense to a products liability claim based upon strict liability failed. The Court held the trial court did

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Annual Expert Deposition Skills Workshop Focuses on Treating Physicians

Medical Billing Also Dissected by Platinum Sponsor AccuMed

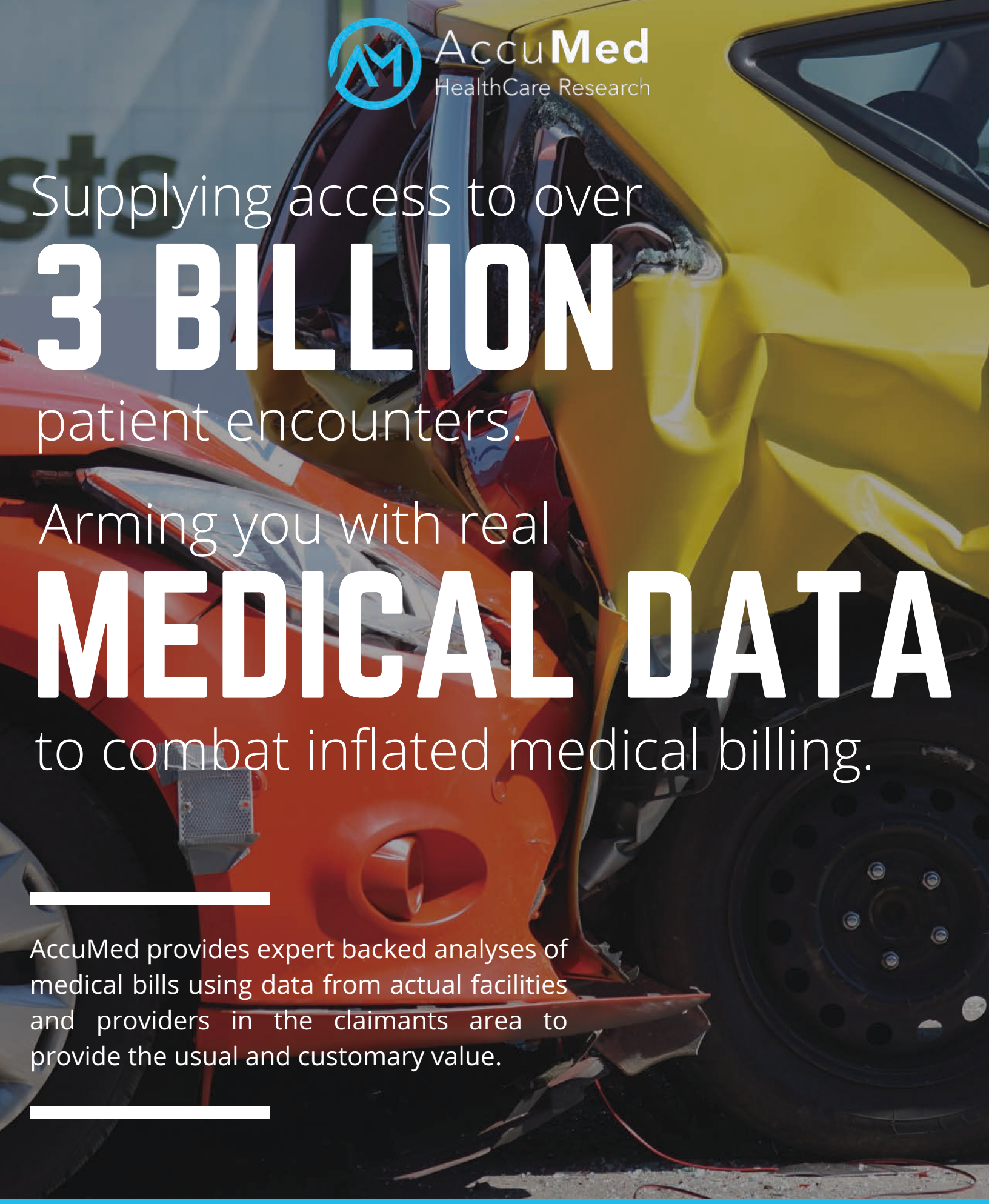
The Third Annual Expert Deposition Skills Workshop again took place immediately preceding the annual judicial reception at State Bar Headquarters.

This installment focused on deposing expert treating physicians, including preparing for the rebuttal of inflated medical billing charges with the use of your own medical billing expert. It also included an update on recent state and federal case law dealing with the admissibility of rebuttal medical billing testimony—including what types of "comparable charges" are fair game and what types are not. The recent *Showan* and *Clouthier* cases were discussed.

Program Co-Chairs Dan Hoffman of Young Thagard in Valdosta and Zach Matthews of McMickle Kurey & Branch in Alpharetta covered the legal aspects, while Mark Guilford with GDLA Platinum Sponsor AccuMed Healthcare Research addressed medical billing.

This annual event takes place the first Thursday of February so calendar February 5, 2021 for the next one, which will precede the 18th Annual Judicial Reception at the State Bar. The particular expert category has not been identified and all ideas are welcomed; email contact@gdla.org with yours.◆

1. GDLA Board members Zach Matthews and Dan Hoffman co-chaired the program, each speaking on the topic; 2. Ken Barre, Donovan Eason and Bert Hummel; 3. Doug Wilde and Hilliard Castilla; 4. GDLA Platinum Sponsor AccuMed addressed determining the reasonableness of medical fees and calculating future needs/costs. AccuMed's Mark Guilford, who presented at the seminar, and Connor Beer are pictured with GDLA Board member Marty Levinson.



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GDLA Honors Atlanta Judges at 17th Annual Reception

GDLA hosted its 17th Annual Judicial Reception at State Bar Headquarters on February 7, 2020, attracting over 150 members and judges.

This yearly gathering honors Atlanta area judges from the state's appellate courts, state and superior courts, State Board of Workers' Compensation, as well as the federal bench.

The event is held annually on the first Thursday in February, so mark your calendar for next year's set for February 5, 2021 at the State Bar. ◆

GDLA's 17th Annual Judicial Reception

1.. Betsy Lowrey, Fulton Superior Court Judge Belinda Edwards, Claire Sumner and Jeff Starr; 2. Jay Doyle, Court of Appeals Presiding Judge Sara Doyle and Edgar Neely; 3. President Dave Nelson and Court of Appeals Vice Chief Judge Carla McMillian; 4. Marty Levinson, Kevin Patrick, Chuck Dalziel and Presiding Supreme Court Justice David Nahmias; 5. Candis Jones and Fulton Superior Court Judge Kimberly Esmond-Adams; 6. Karen Karabinos and Paula Smith; 7. Doug Wilde and Fulton Superior Court Judge Henry Newkirk; 8. Mike Reeves and U.S District Court Judge Mark Cohen; 9. Janice Wallace, Sara Alexandre, Melissa Segal and Court of Appeals Presiding Judge Anne Elizabeth Barnes; 10. State Bar Executive Director Jeff Davis and Fulton Superior Court Judge Paige Whitaker; 11. Tracie Macke and Fulton State Court Judge Susan Edlein; 12. Fulton State Court Judge Diane Bessen and Michael Goldberg; 13. DeKalb Superior Court Judge Stacey Hydrick and Scott Masterson; 14. DeKalb State Court Judge Dax Lopez and Past President Peter Muller.

GDLA's 17th Annual Judicial Reception

Pictured enjoying the 17th Annual Judicial Reception at State Bar Headquarters are (left to right): *1. Court of Appeals Chief Judge Chris McFadden and Beau Howard; 2. Ashley Rice, Fulton State Court Judge Eric Dunaway and Erica Morton; 3. Cobb State Court Judge Eric Brewton, Past President Walter McClelland and Richard Hill; 4. Fulton State Court Judge Jane Morrison and Past President Matt Moffett; 5. Mike St. Amand, Fulton State Court Judge Wes Tailor and Bill Casey; 6. DeKalb State Court Judge Mike Jacobs and Chris Parker.*

GDLA's 17th Annual Judicial Reception

7. Past President Salty Forbes, GDLA member and DRI First Vice President Douglas Burrell, DRI Executive Director John Kouris and Past President Hall McKinley; 8. Michael Rust and Court of Appeals Judge Todd Markle; 9. GDLA member and State Bar YLD President-Elect Bert Hummel with State Board of Workers' Comp Chair Frank McKay; 10. President-Elect Jeff Ward with GDLA member and State Bar Past President Robert Ingram; 11. Frank Bedinger and Elliott Ream; 12. Anne Gower and Executive Director Jennifer Ward with Fulton Superior Court Judges Rachel Krause, Paige Whitaker and Emily Richardson.

GDLA Board Holds Winter Meeting

As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the judicial reception, convening at State Bar Headquarters on February 8, 2020. We were again honored to have DRI Executive Director John Kouris join us for a report on the state of the national defense bar and DRI's efforts in that regard.

GDLA is the state affiliate for DRI and is proud to have our very own Douglas Burrell of Drew Eckl & Farnham in Atlanta serving as DRI First Vice President, meaning he will become DRI President-Elect in October 2021.

Immediately following the meeting, past presidents and officers adjourned to the Capital City Club downtown for the Fifth Annual Past Presidents Luncheon (see page 52). Meeting minutes will be posted in the members only area of our website.

Those present were Executive Committee: President David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; President-Elect Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick; Treasurer George R. Hall of Hull Barrett, Augusta; Secretary James D. "Dart" Meadows, Balch & Bingham, Atlanta; Immediate Past President Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; and Past President Peter D. Muller, Goodman McGuffey, Savannah. Vice Presidents: Ashley Rice, Waldon Adelman Castilla Hiestand & Prout, Atlanta and James S. V. Weston, Trotter Jones, Augusta. Board of Directors: Anne D. Gower, Gower Wooten & Darneille, Atlanta; Daniel C. Hoffman of Young Thagard Hoffman Smith & Lawrence, Valdosta; Zach Matthews, McMickle Kurey & Branch, Alpharetta; Erica L. Morton, Swift Currie McGhee & Hiers, Atlanta; Candis Jones Smith, Lewis Brisbois, Atlanta; Joseph D. Stephens, Cowsert Avery, Athens; Jason D. Lewis of Chambless Higdon Richardson Katz & Griggs, Macon; Martin A. "Marty" Levinson of Hawkins Parnell Thackston & Young, Atlanta; and Tracie G. Macke of Brennan Wasden & Painter, Savannah. Past Presidents: Theodore "Ted" Freeman of Freeman Mathis & Gary, Atlanta; W. Melvin "Mel" Haas III, Constangy Brooks Smith & Prophete, Macon; Kirby G. Mason of Hunter Maclean, Savannah; Walter B. McClelland, Mabry & McClelland, Atlanta; Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; Lynn M. Roberson, Miles Mediation, Atlanta; and William G. Scrantom, Jr., Page Scrantom Sprouse Tucker & Ford (retired), Columbus. Committee/Section Leaders: Legislative Chair Jacob "Jake" Daly, Freeman Mathis & Gary, Atlanta; Women Litigators Section Chair Karen K. Karabinos, Drew Eckl & Farnham, Atlanta; Judicial Committee Chair David C. Marshall, Hawkins Parnell & Young, Atlanta; and Young Lawyers Chair Leah Fox Parker, Swift Currie McGhee & Hiers, Atlanta. Other: DRI First Vice President Douglas K. Burrell, Drew Eckl & Farnham, Atlanta; DRI Executive Director John Kouris, Chicago, Ill; and GDLA Executive Director Jennifer Davis Ward. ◆


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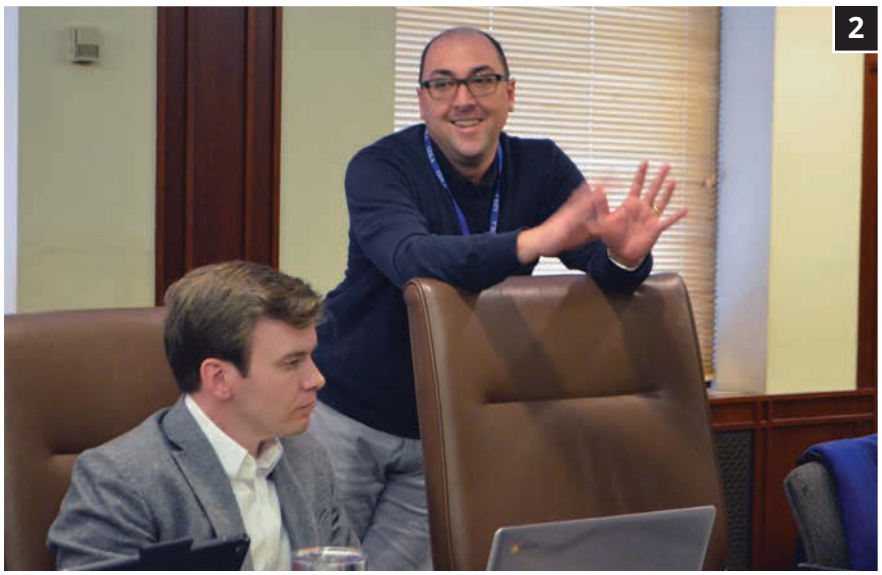
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Pictured are (left to right unless otherwise noted): 1. Past President Hall McKinley, DRI Executive Director John Kouris and President Dave Nelson; 2. Joe Stephens and Jason Lewis; 3 GDLA member and DRI First Vice President Douglas Burrell (center) addresses the Board; 4. Legislative Chair Jake Daly; 5. Judicial Relations Chair David Marshall; 6. Anne Gower and Tracie Macke; 7. Past Presidents Kirby Mason and Bill Scrantom. Bill is an important part of GDLA's history, having been present at the 1967 meeting after which the Association was formed. He later served as our fifth president from 1972-1973.

GDLA Honors Former Leaders at 5th Annual Past Presidents Luncheon

GDLA honored those who have contributed so much of their time to shaping the civil defense bar during the Fifth Annual GDLA Past Presidents Luncheon on February 7, 2020, at the Capital City Club downtown.

The first gathering, held in 2015, was the brainchild of then-President Matt Moffett, who is now among those honored for their commitment to advancing the civil defense bar.

President Dave Nelson welcomed everyone and noted that as GDLA marks the 53rd year since our founding we are closing in on the 1,000-member mark.

Those present are pictured above. On the front row (l-r) are GDLA Past Presidents: Grant B. Smith, 2004-2005, Dennis Corry Smith & Dixon, Atlanta; Hall F. McKinley III, Drew Eckl & Farnham, 2018-2019; Morton G. "Salty" Forbes, 1991-1992, Forbes Foster & Pool, Savannah; William G. "Bill" Scrantom, Jr., 1972-1973, Page Scrantom Sprouse Tucker & Ford, Columbus; Kirby G. Mason, 2014-2015, Hunter Maclean, Savannah; Matthew G. Moffett, 2015-2016, Gray Rust Moffett St. Amand & Brieske, Atlanta. Back row (l-r) current President David N. Nelson, Chambliss Higdon Richardson Katz & Griggs, Macon with Past Presidents Walter B. McClelland, 2001-2002, Mabry & McClelland, Atlanta; Theodore "Ted" Freeman, 2013-2014, Freeman Mathis & Gary, Atlanta; W. Melvin "Mel" Haas III, 2011-2012, Constangy Brooks Smith & Prophete, Macon; Peter D. Muller, Goodman McGuffey, 2016-2017, Savannah; Eugene P. "Bo" Chambers, Jr., 1981-1982, Chambers & Aholt, Decatur; and Lynn M. Roberson, 2012-2013, Miles Mediation, Atlanta.

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Catch-22

Continued from page 28

Smart plaintiff counsel know that they need causation opinions to get their clients' damages to the jury. In recent years, they have mostly been able to have their cake and eat it too, by simply asking the patient's treating physician to provide the causal opinion necessary to link his treatment to the underlying accident.

However, recent federal case law demonstrates that the Courts have gotten wise to this ploy, and are beginning to enforce the distinctions between Rule 26(a)(2)(B) and Rules 26(a)(2)(C) more stringently. Most notably, in *Kondragunta v. Ace Doran Hauling & Rigging Co.*, 1:11-CV-01094-JEC, 2013 WL 1189493, at *4 (N.D. Ga. Mar. 21, 2013), then-Chief Judge Carnes of the Northern District of Georgia (since elevated to the 11th Circuit) analyzed in detail the difference between a true "treating physician" and a retained testifying expert who is merely masquerading as a treating physician in order to sneak in a causation opinion:

> [T]he label of 'treating physician' is irrelevant; instead, the determination turns on the substance of the physician's testimony. When a treating physician testifies regarding opinions that have been formed and based on observation made during the course of treatment, he need not produce a Subsection B report. By contrast, treating physicians offering opinions beyond those arising from treatment are experts from whom full Rule 26(a)(2)(B) reports are required.
>
> *Kondragunta*, 2013 WL 1189493, at *10-11 (citations and punctuation omitted).

In other words, if the so-called "treating physician" has formulated his or her causal opinion using only the information provided by the patient in the course of treatment or observed by the doctor herself, it may come in. If the "treating physician" has relied upon information provided from other sources, most notably the patient's lawyer, then the causal opinion is really that of a retained, testifying expert. As a retained, testifying expert, the treating physician must provide a full Rule 26(a)(2)(B) report, including disclosure of four years of past testimony in which he or she has similarly given a causal opinion. This requirement is absolute kryptonite to a litigation-funded doctor, who may testify up to 100 times per year, always in favor of the plaintiff and always in pursuit of the inflated medical bills recovery noted above. When a "treating physician" has given the exact same causal opinion hundreds of times and has never opined otherwise, his or her credibility tends to go out the window.

So, why not simply whitewash the causal opinion by having the doctor carefully rely only upon information provided by the plaintiff herself? This is where the trap clamps shut, because there is a second step to the admissibility analysis that is not controlled merely by the expert disclosure rules. A testifying expert must also pass the so-called "*Daubert* gate," meaning his or her proposed expert testimony must be reliable and must be based upon "sufficient facts or data". If the causal opinion can't survive *Daubert* scrutiny, it doesn't matter if the treating physician sneaks in under the abrogated disclosure rule of Rule 26(a)(2)(C), because the opinion will be excluded as unreliable and unscientific. Again, if the causal opinion fails the *Daubert* gate, the defendant will be entitled to partial summary judgement as to all treatment not susceptible to lay understanding (typically meaning any surgeries and post-surgical treatment the plaintiff may have received).

In order to render a proper medical causation opinion, federal case law makes clear that a doctor must perform a differential diagnosis, meaning he or she must consider all of the other possible explanations for a given condition, including pre-existing conditions, degenerative changes, past injuries, etc. *Rangel v. Anderson*, 202 F. Supp. 3d 1361 (S.D. Ga. 2016). It is not typical for a treating physician to consider whether a person has ever had a car wreck in the past in deciding how to treat, for example, a herniated disk. After all, ordinary doctors' jobs are not to consider distant questions of medical causation; instead their job is to diagnose the condition as it then exists and formulate a plan of treatment.

This is the true Catch-22: In order for treating physician to perform a proper differential diagnosis and thereby formulate a medical causation opinion which will survive *Daubert* scrutiny, he or she usually must consider materials that are outside the scope of treatment needed by the patient at that particular time. Most typically, the doctor must rely upon the plaintiff counsel to provide information regarding past auto accidents, past sports injuries, etc., so the doctor can rule those out in providing the necessary causation opinion. If the plaintiff admits to a past car wreck at her deposition and the treating physician has not ruled that past car wreck out in formulating a causal opinion, then the opinion should not pass the *Daubert* gate, and the defendant may be entitled to partial summary judgment. This is a plaintiff's lawyer's worst-case-scenario. Unfortunately for the doctor, the very act of considering materials outside the scope of treatment needed by the patient at

that particular place and time automatically converts the so-called "treating physician" into a retained, testifying expert, for the reasons explained by Judge Carnes in *Kondragunta*.

The bottom line is that a testifying doctor can no longer have his cake and eat it too. He or she must pick a lane: if the doctor intends to offer a medical causation opinion which will survive a *Daubert* challenge, the doctor must solicit sufficient information to perform a true differential diagnosis, and submit to a full Rule 26(a)(2)(B) disclosure (including four years of past depositions). If the treating physician intends to leave the medical causation work up to someone else, he or she can remain a mere Rule 26(a)(2)(C) expert, but can only testify to matters of diagnosis (not causation) and treatment, except in cases involving very obvious injuries which do not require expert explication.

There may be rare cases where a plaintiff has absolutely no past history of injuries or treatment, in which a testifying expert can solicit enough information to perform a true differential diagnosis while relying only on information provided by the plaintiff as part of the plaintiff's need for treatment. However, those cases are not the norm. In the typical neck-and-back litigation funded doctor case, the plaintiff will have a history of prior accident or injury. He or she will be unable to convey enough data to the doctor for purposes of treatment only to allow a proper differential diagnosis. This is a tight squeeze indeed; the plaintiff counsel who intends to put up a litigation-funded treating physician as a medical causation expert had better provide a full Rule 26(a)(2)(B) disclosure, with all of the bias, intent and motive demerits that disclosure entails, and must also ensure the doctor provides a proper differential diagnosis that satisfies *Daubert*, or he may see his client's damages presentation eviscerated via a motion for partial summary judgment.◆

Zach M. Matthews is a partner at McMickle Kurey & Branch in Alpharetta and a member of the GDLA Board of Directors. He focuses on motor carrier defense, premises liability, negligent security, and construction defect matters. sporting venues). He is an experienced trial lawyer who regularly handles civil jury trials in state and federal court. He recently served as program vice-chair and a speaker at GDLA's 4th Annual Deposition Skills Workshop focused on treating physicians (see page 44).

Expectation of Hazard

Continued from page 30

thing is to what we are attending to, the less likely that we will be aware of it (Most et al., 2001). Whether we are monitoring people in a crowd or driving through a city, we find that irrelevant objects sharing a defining feature(s) with a target object are likely to be noticed) Most & Astur, 2007; Simons & Chabris, 1999).

The second factor is expectation. Unlike similarity, which depends upon the physical features of objects, expectation is a purely mental process. Human factors research on decision-making describes expectation as a bias, or priority, given to a potential decision (e.g., Desimone & Duncan, 1995; Logan & Gordon, 2001). For example, we expect, but do not know, that drivers will stop at a red light. The development of this biased understanding of driver behavior is partly influenced by a combination of our knowledge of the traffic rules (e.g., non-emergency vehicles must stop at red lights), conventions (e.g., everyone is taught to stop at red lights), and our personal experience (e.g., I've never seen anyone run a red light, so everyone will stop). The more frequently an event occurs that is consistent with our prior experience, the more likely we are to develop an expectation that future similar events will occur in the same/similar manner.

Expectation guides what and where we focus our attention. With repeated experience, a bias is developed to focus on information in the environment that is most relevant to achieving a goal. Because of this learned bias, we can grow less sensitive to the presence of irrelevant events: Irrelevant events that were once considered to be similar enough to what we were focused on, and would thus catch our focus of attention, now pass by unnoticed.

The change in what irrelevant information our minds filter out is a common occurrence in our lives. For example, compared to novice drivers, experienced drivers focus their attention on areas of the roadway associated with guidance, such as traffic lights and signs at intersections, and they consistently look towards regions where hazards are most likely to appear (Charlton & Starkey, 2013; Garay-Vega et al., 2009). Experienced drivers also pay less attention to areas where hazards are less likely to come from (Yanko & Spalek, 2013). If a driver sees a pedestrian standing on the sidewalk at an intersection, the driver will likely assume that the pedestrian will attempt to cross the street at the intersection. This is because, based on our experience, pedestrians are much less likely to attempt to cross a street at an uncontrolled midblock location, i.e., a location without traffic control devices to assist crossing pedestrians, than at intersections (Chu et al., 2004). Even when a pedestrian is seen standing on the sidewalk midblock, a typical driver reasonably expects that it is unlikely that the pedestrian will abruptly jaywalk into his path such that he would need to brake and/or steer to avoid a collision. Thus, a driver's expectation of pedestrian behavior can become so well-defined that it can reduce a driver's ability to look for and focus on the presence of a pedestrian who appears unexpectedly in or near the driver's path of travel (Wolfe et al., 2005). Even if the driver is engaged in a seemingly innocuous driving-related task, such as watching an adjacent lead vehicle merge into his lane, the driver may not become aware of a jaywalking pedestrian until a collision is unavoidable. This is because the behavior of the jaywalker is both unexpected and dissimilar to the driver's task of attending to the behavior of other vehicles. Low illuminance conditions, e.g., nighttime on an unlit roadway, can further exacerbate this problem. Awareness of the pedestrian can become impaired for multiple reasons, including: lower lighting levels that reduce the visibility of the pedestrian against his background environment, headlight glare from an oncoming vehicle that obscures a pedestrian near that vehicle (Wood et al., 2005), and the driver focusing his attention on a more limited area of the roadway at night (Brimley et al., 2015). All of these issues can reduce the potential for a driver to see a pedestrian and avoid a collision.

Before arguing that the collision was avoidable, you must determine whether, under the circumstances the driver was in, it was reasonable for the driver to *not* be aware of the hazard, i.e., the pedestrian moving into/through his lane of travel, until a collision could not be avoided? Just because a driver *could* see a potential hazard does not mean that the driver *should* have seen it. Furthermore, avoiding a collision is not the responsibility of only the driver. Other parties may have a contributory role in the collision, e.g., the pedestrian crossing the road midblock made a decision that was contrary to what typical drivers know and expect, the design of the roadway or crosswalk, the typical behavior of pedestrians, etc. When investigating traffic accidents in which there is no clear explanation for why at least one of the involved parties did not see an otherwise easily visible object, care must be taken to examine the human factors involved in the collision. This includes assessing the driver's behavior, goals, and expectations—not only the visibility of the object—in the moments leading up to the collision. Simply knowing where the driver was looking and what he was doing before a collision does not always provide the level of insight into the driver's role in the collision. Accidents do occur in which a driver was presented with an unexpected hazard that could have been avoided, had the driver expected its presence.

In those situations, without addressing the human factors, the driver's actions, or lack thereof, may be grossly mistaken for negligence at best or malice at worst, rather than being representative of the behavior of a reasonable and attentive driver who was presented with an unfortunate set of circumstances. ◆

J. Jay Todd is a Senior Consultant with GDLA Platinum Sponsor Rimkus Consulting. He holds a Ph.D. in Psychology with an emphasis in Neuroscience from Vanderbilt University. Dr. Todd investigates the effects of limitations in task performance and perception on our awareness and experience of events in our environment. He also investigates the development and speed at which we become aware of events, e.g., an imminent vehicle collision and awareness of pain and suffering.

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Impediments to Settle

Continued from page 32

- Plaintiff or Claimant is receiving Social Security Disability benefits but is not yet Medicare eligible;
- Plaintiff or Claimant has applied for Social Security Disability benefits, has had the application for benefits denied or is appealing the denial of the application for benefits;
- The settlement or verdict is greater than $25,000 and the Plaintiff or Claimant is Medicare eligible;
- The total value of the settlement or verdict is greater than $250,000 and it is reasonably anticipated the Plaintiff or Claimant will be eligible for Medicare benefits within 30 months; and
- The injuries are such that it can be reasonably anticipated that the Plaintiff or Claimant will be Medicare eligible within 30 months.

If the entity that has the reporting requirement fails to properly report a settlement or verdict, it is subject to a fine of $1,000.00 per day per claim, so those entities have become intent on obtaining the necessary information to properly report a settlement or verdict, even in cases where there is little, or no, chance that the Plaintiff or Claimant is, or will be within 30 months, Medicare eligible. This has created impediments, delays in settlement negotiations, and the finalization of settlements.

In addition to the reporting issues, decisions must be made about whether arrangements have to be made to satisfy the Medicare secondary payer requirements. That topic is much too broad to be covered in this article, but secondary payer issues can be addressed with Claim Settlement Allocation, Liability Settlement Allocation and Liability Medicare Set-Aside plans. There are many qualified companies that can assist you in the development of these plans.

MEDICARE LIENS

This impediment to settlement is so well-known, I will not discuss it in great detail. If the Plaintiff or Claimant has received Medicare benefits for the injuries received in the incident that is the subject matter of the lawsuit or claim, Medicare has a lien on the proceeds of any settlement and/or verdict, and that lien can be enforced against the injured party, the tortfeasor and the tortfeasor's insurance carrier if the lien is not satisfied, compromised and/or resolved. It is absolutely essential that the injured party's attorney, defense counsel and the insurance claims representative determine whether Medicare benefits have been paid and they are addressed.

MEDICAID LIENS
O.C.G.A. § 49-4-149

If you know or suspect that Plaintiff is receiving Medicaid benefits, you should determine whether there is an enforceable Medicaid lien. Medicaid liens are filed by the Department of Community Health (DCH). The lien is for payment of medical care and treatment provided to Medicaid recipients. The lien is on the proceeds of a settlement or verdict received from a third-party tortfeasor or insurer. The DCH perfects the lien by complying with O.C.G.A. §§ 44-14-470 through 44-14-473. The lien must be filed within one year from the last date of treatment for which Medicaid benefits were paid. The DCH files the lien notice in the county where the Medicaid recipient resides and in Fulton County. A Medicaid lien does not affect the priority of attorney's liens. The DCH is subrogated to the reasonable value of medical assistance provided after written notice of the lien. The subrogation right attaches when the services are provided. Subrogation action must be brought by DCH within one year of liability being finally determined. Final determination means that all the claims arising out of the incident for which the Medicaid recipient received medical treatment have been resolved by settlement or trial.

MEDICAL LIENS
O.C.G.A. §§ 44-14-470-476

Often medical liens are not addressed or identified before a mediation. Resolution of all medical liens always becomes a condition of settlement, therefore if the liens are not addressed before the mediation, they can become a serious impediment to resolution of the case. Medical liens can be filed by hospitals, nursing homes, physicians, and traumatic burn care facilities. With respect to traumatic burn care facilities, the reasonable cost for the treatment must exceed $50,000. The lien is on the proceeds of any settlement or verdict received from a third party tortfeasor or insurer. Not less than 15 days before filing the lien, the medical care provider must provide written notice to the patient, third party tortfeasors and their insurers. The notice must be sent by first-class and certified mail or statutory overnight delivery, return receipt requested. The lien notices must be filed in the county where the medical services are provided and in the county where the patient resides. The lien notice must be filed within 75 days of discharge from the hospital, nursing home or traumatic burn facility. If the lien is being filed by a physician, the lien must be filed within 90 days of the first treatment provided by the physician. Improper perfection of the lien invalidates the lien, except those who receive actual notice of the lien by reliable forms of delivery before settlement or verdict.

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The lien can be enforced against a tortfeasor that has actual or constructive notice of the lien. The action to enforce the lien must be brought within one year of the final determination of liability as defined in the Medicaid lien section above.

RIGHT OF REIMBURSEMENT O.C.G.A. § 33-24-56.1

A health insurance carrier that provides for reimbursement for benefits paid for medical treatment received as a result of injuries caused by a third party tortfeasor may recover from the injured party if the amount of the recovery exceeds the sum of all economic and noneconomic losses incurred as a result of the injury, exclusive of losses for which reimbursement may be sought under this code section. A declaratory judgment action can be filed for a court to determine whether the injured party has been fully compensated. The injured party must provide notice by first-class and certified mail or statutory overnight delivery, return receipt requested, to the benefits provider no less than 10 days before consummation of a settlement or trial. If the injured party provides the required notice to the benefits provider, the benefits provider can only assert reimbursement rights if it has provided notice by reliable methods to the injured party of its claim for reimbursement. If the 10-day notice is not provided by the injured party, the benefits provider is not subject to the prior notice requirement.

ERISA LIEN

If the health insurance policy is covered by ERISA, the Georgia full compensation statute may not apply due to federal preemption. You must determine whether the insurance policy is an insured health plan or is a self-funded health plan. If it is a self-funded health plan, the full compensation statute may not apply. The plan must specifically provide for reimbursement from settlement or verdict proceeds and comply with the specific-fund doctrine. Reimbursement is limited to the amount paid for injury related care. For the full compensation statute not to apply, the plan must specifically provide that the made whole doctrine does not apply. Depending upon the language of the plan, the injured party's attorney's fees may or may not be factored in.

“If the injured party provides the required notice to the benefits provider, the benefits provider can only assert reimbursement rights if it has provided notice by reliable methods to the injured party of its claim for reimbursement. If the 10-day notice is not provided by the injured party, the benefits provider is not subject to the prior notice requirement.”

CHILD SUPPORT LIEN O.G.G.A. § 19-11-18

Under the Child Support Recovery Act, an IV-D agency can acquire a lien for unpaid child support obligations. The lien applies to past due and accrued child support after the lien is perfected. Upon proper recordation or registration of the lien, the lien encumbers all tangible and intangible property, whether real or personal, and any interest in property, whether legal or equitable, belonging to the individual that owes child support (the obligor). The lien applies to any property interest owned by the obligor or acquired by the obligor after the child-support lien arises. Notice of the lien must be provided to the obligor by first-class mail at least once a year. If proper notice has been provided to the obligor and child-support remains unpaid, the IV-D agency can demand any person or entity in possession of property subject to the lien turn over possession of the property to the agency. The person or entity is only obligated to turn over sufficient property to pay the outstanding child support obligation. If the property is not turned over to the agency, the person or entity is subject to paying the amount of the property, up to the amount of the unpaid child support, plus costs and interest.

ASSIGNMENT OF PERSONAL INJURY RECOVERY

An injured party may assign to a medical care provider his or her rights to the proceeds that may be recovered as a result of any compromise, settlement, arbitration, mediation, litigation, award, judgment or verdict. Often this is done when the injured party has no health insurance and is unable to pay for the medical care. If done properly, these assignments are valid and should not be ignored. In Santiago v. Safeway, 196 Ga. App. 480; 396 S.E.2d 506, the court found that the debtor, which was a first party insurance carrier, of the assignor, which was the injured party, who had notice of the assignment by the injured party to the medical provider, in this case a chiropractor, paid the debt to the assignor at its own peril. The court said that it is the established rule in the United States that an assignment for valu-

able consideration, with notice to the debtor, imposes on the debtor an equitable and moral obligation to pay the assignee. The long and short of this ruling was Safeway paid for the medical expenses twice. There is no reason why this case law would not equally apply to third party insurance carriers that have notice of the assignment.

LAWSUIT LOANS

There are times when injured parties with no health insurance coverage or with limited means, particularly when their injuries have resulted in an inability for them to work, need funds to pay for medical care and/or daily living expenses. There are many companies that provide loans to injured parties. To obtain the loan, the injured party assigns the proceeds of any recovery from a first party or third-party claim to the lending company. These loans often result in amounts owed that substantially impact the ability to settle the case.

APPORTIONMENT—EFFECT ON CONTRIBUTION AND INDEMNITY CLAIMS

For quite some time after the apportionment statute was passed, there was a great debate about whether contribution and indemnity were still alive and well in tort cases. After several court cases addressed this issue, it seemed to be the consensus that the apportionment statute did away with contribution and indemnity claims in tort actions. The case of Zurich American v. Heard, 321 Ga. App. 525; 740 S.E.2d 429 (2013) has brought those claims back into play in settlement negotiations.

The Court of Appeals effectively held that unless there is an adjudication on the merits of the percentage of fault of each at fault party, the non-settling at fault party can maintain a claim for contribution and/or indemnity against the settling at fault party. This case must be considered whenever you are trying to settle a case as one of the at fault parties in a multiple at fault party or non-party case. The case also has to be considered when making an offer of settlement in a multi-party case. Your client and the insurance client may still be better overall settling the claims, but you must make sure they both understand the potential for a claim for contribution to be brought by the non-settling tortfeasors.

As an aside, if you are representing the defendant when there is an uninsured motorist carrier involved, you must take into consideration the uninsured motorist carrier would still have a claim for subrogation against your client. ◆

Lemonade, Drones ...

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fessional lives. Entering the term 'Cyber Business Interruption' into a Google search returns 1,330,000 results in a mere .45 seconds. Cyber losses have occurred at: Equifax, Target, InterContinental Hotel Group, Arby's, Dun & Bradstreet, Saks, Chipotle, Gmail, Kmart, University of Oklahoma, Washington State University, BCBS/Anthem, Verizon, Deloitte, Whole Foods, Yahoo, Uber, eBay and many others.

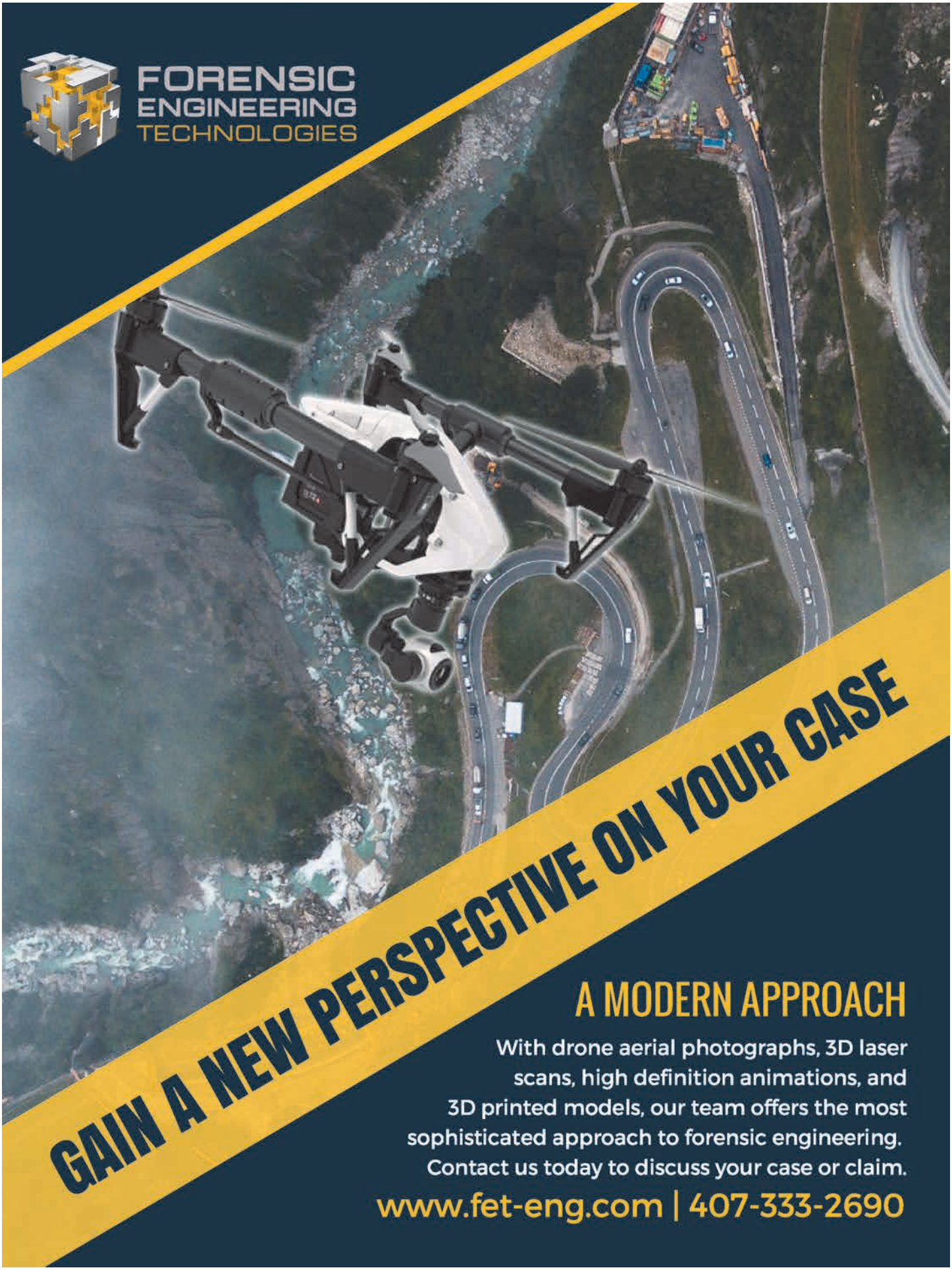
While companies have had decades, and in some cases centuries, to work out the risks of fire, natural catastrophes and physical theft, cybercrime is relatively new, with more sophisticated schemes being developed every day. Forrester Research Inc., surveyed 4,103 organizations of varying size in the private and public sectors across five countries: the U.K., U.S., Germany, The Netherlands and Spain. Of the organizations surveyed, 45 percent were hit by at least one cyber attack in the past year and two-thirds of those targeted suffered two or more attacks.

"Cyber risk has become a boardroom issue over the past years, following some high-profile hacker attacks," Paul Bantick, Head of Cyber Insurance at Beazley, said in an interview. "We haven't seen the big breaches at the retailers such as in 2015 or the large health-care breaches that occurred in 2016. Yet, there's still a high frequency of smaller losses." One industry executive noted, "We are optimistic that it can develop into the industry's next blockbuster. Cyber insurance is our key growth area at the moment."

Although cyber business interruption still represents a small segment of the insurance industry, the number of policies being written is increasing, and cyber claims will continue to become more frequent and complex. Cyber policies are still evolving and each carrier's wording and definitions are different. Engaging a forensic accountant with experience working with these types of losses can ensure the specific wording is applied properly to the complex accounting issues that can rise on these claims.

Technology is evolving daily and how we choose to adapt, accept and apply those technologies in our personal lives and workplaces will dictate who changes and improves over time. There are still those who prefer an old school approach with a hard copy backup, but the insurance industry is clearly evolving through new technologies like Lemonade, drones, artificial intelligence and chatbots. Stay tuned for the next wave of advancements! ◆

Chris Frederick is a partner and Kyle Aldridge is a director in the Dispute Resolution and Forensics Practice of Bennett Thrasher, a GDLA Platinum Sponsor. Their primary focus is within BT's Insurance & Claims Group. Mr. Frederick has extensive experience in the management of engagements related to business interruption and extra expense, property damage, reported values, litigation support and forensic accounting.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Superyacht Dismasting

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Figure 5. The upper failure showing buckling of the foremast towards the port side.

The upper failure showed buckling and cracking of the aluminum mast shell. The upper failure had several unusual features. Besides the buckling towards the port side, three features were evident: horizontal cracking parallel to the buckling, pulling apart along the vertical weld line, and large, deep weld penetration "nuggets" along the port-side weld.

Figure 6. The vertical and horizontal fractures of the foremast viewed from the inside. Note the large, through-thickness weld nuggets along the right side of the seam weld.

The halves of the mast were joined primarily by partial-penetration seam welds. The full penetration nuggets may have been a method of stabilizing the structure with spot welds or may have been an error of some sort resulting in local hot spots. In either case they were well past full penetration. The seam weld related fracture only occurred near the hot spots.

The semi-cylindrical sections had an elongated S-shape along one edge, to allow overlap welds, and that shape is evident in the figure above. Welds were performed from the outside, through the outer plate. A metallurgical examination evaluated hardness along the hot-weld nuggets, and microscopic examination was performed for the fracture paths both vertically and horizontally. The vertical fracture did not follow the weld path, but rather followed the weld hot-spots. This particular aluminum alloy may be heat-treated to full hardness after solidification, but material along the edge of the weld which is overheated but not melted may form broad soft zones with large grains, which are termed heat-affected zones (HAZs). Softening within the HAZs was documented by microhardness traverses of cross sections following the surface normal to the red cut lines in the image below. The subject area of this plate was originally 1/4" thick. The hardness traverses were at the mid-line of the lower plate, or 1/8" from the bottom (outer surface).

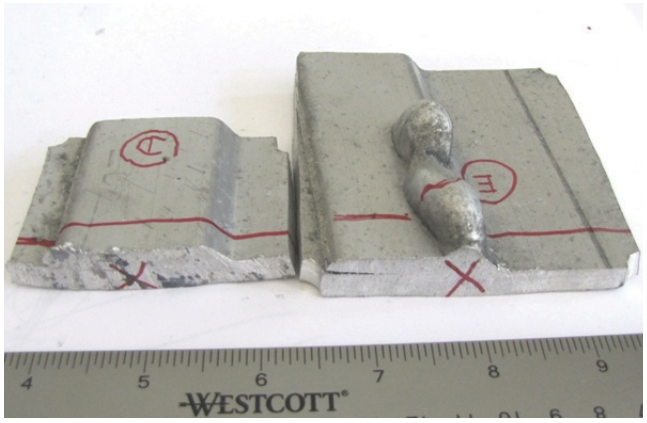

Figure 7. Inside surface pieces of the seam weld near the failure showing an ordinary weld (left) and a hot spot weld (right).

The HAZ minimum hardness values were found to be significantly softer for the hot spot welds than for the partial-penetration welds or the base material. The hardness values corresponded to tensile strengths of 35,000 psi (35 ksi) for the base plate and weld nugget, 33 ksi for the HAZ of the partial-penetration weld and 29 ksi for the HAZ of the hot spot weld. The crack path along the hot spots went along the HAZ region which was about 20% weaker than the plate. The horizontal cracks showed signs of exfoliation corrosion. Exfoliation corrosion may follow after failure of the protective paint layer due to subsurface cracking.

A detailed study of the fracture surface showed thick oxidation layers in the HAZ cracking. The first cracks in the history of this 33-year-old mast were along the HAZ. The subsequent failure was horizontal, and characterized by exfoliation corrosion, with layers of material removed parallel to the plate surface.

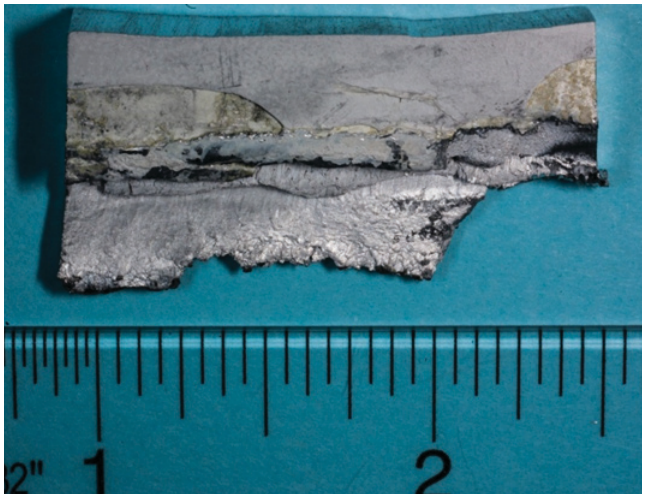

Figure 8. Horizontal crack from region "C" in Figure 6. Fracture shows features of exfoliation corrosion.

Scenario:
The mast was assembled by seam welding of shells, with welds in the longitudinal direction (which was vertical on the mast). The hot-spot nuggets were only found in the region of buckling and were associated with the HAZ cracking. Weakening of the seam allowed more flexing of the mast, failure of the protective paint, and corrosive attack of the plate. The flexing and corrosion led to the horizontal cracking and buckling. Once buckling of the upper mast occurred, the aerodynamic instability of the mast altered the loading on the lower mast and caused the sudden shear fracture closer to the base.

Prevention:
The hot spots were a manufacturing defect which would have been difficult to observe by visual inspection. These nuggets were on the inside of the masts. Detection would require the use of internal inspection, x-ray imaging or some other type of nondestructive testing such as ultrasonic thickness testing. One visual indication of unusual mast flexing was the separation of the paint on the outside of the mast. That effect was observed near fractures and could have been present prior to catastrophic failure. An inspection protocol was recommended which included paint inspection along with more sophisticated non-destructive testing methods.◆

OSHA Update

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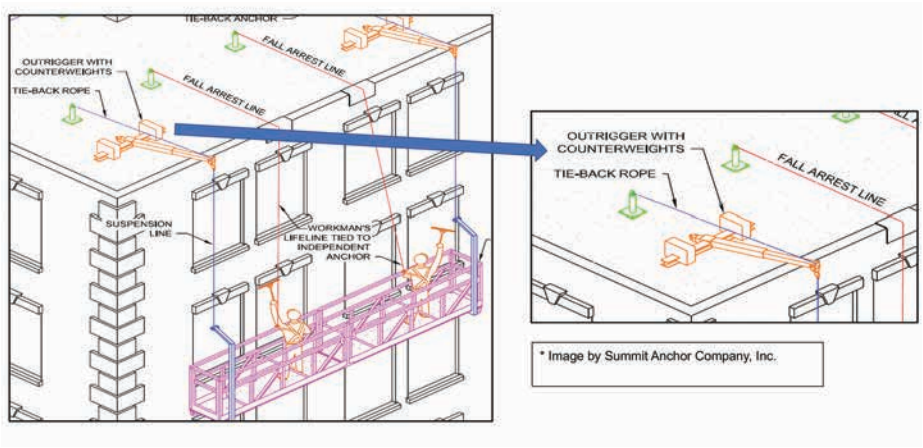

Examples of Building Anchorages:

Parapet Clamp

Plate w/ U-Bar

Manufactured Anchorage

Horizontal Lifeline

Strap Anchors

Rafter Anchor

5. Administrative Controls—Involves use of signals and warnings to indicate the presence of fall hazards. These controls include safety monitors, warning lines and restriction access codes. These controls prove to be the most ineffective form of fall protection.

Rules, Regulations, and Standards

OSHA 1926 provides Safety and Health Regulations for Construction. The most frequently cited serious violations of OSHA 1926, Subpart M are:

1. Failure to protect workers from falls of 6 feet or more off unprotected sides or edges, e.g. floors and roofs.
2. Failure to protect workers from falling into or through holes and openings in floors and walls.
3. Failure to provide guardrails on runways and ramps where workers are exposed to falls to a lower level of 6 feet or more.

ANSI Z359, the "Fall Protection Code," is the voluntary consensus standard and is written in language that can be adopted by local jurisdictions. The intention of this code is that employers whose operations fall within the scope and purpose of the standard will adopt its guidelines and requirements. In this document, the following definitions are provided in Section 3.2.3, "Qualified Person" (partial):

- Responsible for supporting the fall protection system.
- Expertise in system design, structural analysis, anchorage certification, compliance with fall protection standards.
- Supervises the design, selection, installation, and inspection of certified anchorages and horizontal lifelines.

Section 3.2.4, "Competent Person" (partial):

- Responsible for the supervision, implementation, and monitoring of the fall protection program.
- Knowledgeable through experience and training of applicable fall protection regulations, standards, equipment, and systems.
- Conducts a fall hazard survey to identify fall hazards before Authorized Persons are exposed to those hazards.
- Has the authority to stop work immediately due to unsafe conditions.
- Verifies that Authorized Persons are adequately trained.
- Supervises the selection, installation, use, and inspection of "non-certified" anchorages.

Section 3.2.4, "Authorized Person" (partial):

- Has a working understanding of (and potentially is certified for) the employer's fall protection policies and procedures.
- Properly inspects and uses fall protection equipment and systems.
- Informs the Competent Person regarding unsafe conditions.

The goal of building owners and property managers is to mitigate risk and liability for work performed on their property by Contractors and by the Owner's in-house staff. To perform this, responsibilities include:

- Providing a Use Plan.
- Providing "certified" building anchorages.
- Providing fall protection training to in-house personnel (Authorized).
- Having a Competent Person on staff.

The goal of Contractors is to mitigate risk and liability for their Employees performing work for the contracting company. To perform this, responsibilities include:

- Provide an Access Plan.
- Provide proper tools and equipment, including PPE.
- Provide fall protection training to employees (Authorized).
- Have a Competent Person on staff.
- Have a Qualified Person on staff or retain one as necessary.

Summary

In summary, skilled safe access requires a holistic approach for proper execution. Roles and responsibilities must be defined and access plans must be in place. Trained and certified personnel using proper equipment are necessary to mitigate risk.◆

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Premises Liability

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of hospital's motion for summary judgment because plaintiff's testimony that she slipped on a slick floor but did not know why the floor was slick only amounted to conjecture and did not create a genuine issue of material fact regarding causation); *Pinckney v. Covington Athletic Club & Fitness Ctr*., 288 Ga. App. 891, 893, 655 S.E.2d 650 (2007)(Affirming summary judgment because plaintiff's belief that algae on a pool deck caused her fall was only speculation and did not create a genuine issue of fact as to the existence of a hazardous condition); *Bryant v. DIVYA*, 278 Ga. App. 101, 105 (2006)(Plaintiff slipped in the hotel shower, although anti-skid strips lined the floor and a safety bar ran along the back. The plaintiff complained that this was not reasonable: it was not enough to prevent her fall.

The Court concluded that there was no evidence of a hazard "other than her fall." *Id.*); *Flagstar Enters., Inc. v. Burch,* 267 Ga. App. 856, 858, 600 S.E.2d 834 (2004) (reversing denial of summary judgment to defendant because plaintiff's conjecture that a "damp film" on a restaurant floor somehow caused his fall was nothing more than mere speculation); *Shadburn v. Whitlow,* 243 Ga. App. 555, 557, 533 S.E.2d 765 (2000) (holding that a hotel premises operator was entitled to summary judgment when witnesses "believed" plaintiff fell on loose carpeting but also admitted that they were not certain what caused the fall) *Avery v. Cleveland Avenue Motel*, 239 Ga. App. 644, 521 S.E.2d 668 (1999) (Plaintiff's belief that worn and frayed carpeting caused her fall was speculation and did not establish causation); see also *Futch v. Super. Disc. Mkts. Inc.*, 241 Ga. App. 479, 536 (1999); *Carroll v. Georgia Power Co*., 240 Ga. App. 442, 443 (1999); *Hall v. Cracker Barrel*, 223 Ga. App. 88 (1996) (plaintiff's bare assertion that the floor was 'slippery,' without more, was insufficient to create an issue of fact as to whether the fall was caused by the defendant's negligence).

To avoid summary judgment on her claim, the plaintiff would have to prove that the condition of the rocks that she slipped on constituted an unreasonable hazard. Plaintiff failed to offer any proper evidence that the embedded rocks in the area near the vacuum were wet and constituted a hazardous condition. Instead, the plaintiff's bare contentions were controverted by the plaintiff's sworn testimony. Plaintiff speculated that there might have been water on the rocks from a car wash, but her specific deposition testimony contradicted that speculation. "An inference cannot be based upon evidence which is too uncertain or speculative or which raises merely a conjecture or possibility." *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991) see also *Green v. Sams*, 209 Ga.App. 491, 498, 433 S.E.2d. 678 (1993). And, a finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists. *Id*.; *Lovins v. Kroger Co*., 236 Ga. App. 585, 586(1)(a), 512 S.E.2d 2 (1999). Further, on a motion for summary judgment an inference from circumstantial evidence has no probative value against positive and uncontroverted evidence that no such fact exists. *Ricketts v. Advanced Dental Care, L.L.C.*, 285 Ga.App. 480, 485-486, 646 S.E.2d 705 (2007).

Speculation that raises a conjecture or possibility of a hazardous condition is not sufficient to create an inference of fact for consideration on summary judgment. See *Richardson v. Mapoles*, 339 Ga. App.870, 872-873, 794 S.E.2d 669 (2016); *Season All Flower Shop, Inc. v. Rorie*, 323 Ga.App. 529, 534, 746 S.E.2d 634 (2013); *Tuggle v. Helms*, 231 Ga. App. 899, 902; 499 S.E.2d 365 (1988); *Sherwood v. Boshears*, 157 Ga. App. 542, 544; 278 S.E.2d 124 (1981). Although [plaintiff] testified that she slipped because the [rocks were smooth], she also admitted that she saw nothing on the [rocks] and [thus] . . . she did not know if the [rocks] felt [slippery] because there was a foreign substance thereon. . . . [plaintiff's deposition] testimony was insufficient to create an inference that a hazardous condition, in fact, existed. *Glynn-Brunswick Mem. Hosp. Auth. v. Benton*, 303 Ga. App. 305, 307-308, supra.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. O.C.G.A. § 91156 (c). "A defendant may demonstrate that he is entitled to summary judgment by either presenting evidence negating an essential element of the plaintiff's claims or establishing from the record an absence of evidence to support such claims." *Griffin v. Turner*, 350 Ga. App. 694, 695, 830 S.E.2d 239 (2019). Because the defendant established that there is no evidence of hazardous condition and plaintiff failed to point to any specific evidence giving rise to a triable issue, "[i]t follows that the trial court erred in denying [the] motion for summary judgment." *Glynn-Brunswick*, supra at 308.

The Court of Appeals reversed the trial court's denial of the defendant management company's summary judgment motion. Chief Judge Chris McFadden authored the opinion with Presiding Judge Carla McMillian and Senior Appellate Judge Herbert E. Phipps concurring. (Note: The author was counsel for the appellant; Alfreda Williams was counsel for the appellee; and the trial judge was Hon. Toby Prodgers, Cobb County State Court). ◆

Products Liability

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not err in apportioning Johns' damages award on his claim for strict products liability pursuant to the Georgia apportionment statute. The Court also held the trial court did not err in apportioning the damages awarded to Johns' wife based on her loss of consortium claim because her claim was derivative of Johns'.

The Supreme Court granted Plaintiffs' petition for certiorari on January 13, 2020. GDLA filed an *amicus* brief on March 5, 2020 (see page 24).

PRODUCT DEFECT; FAILURE TO WARN; MANUFACTURER; DAMAGED PRODUCT THEORY; INCOMPATIBILITY THEORY: District court denied Defendant Precision Shooting Equipment's motion to dismiss Plaintiffs' failure to warn claim. The Court held: (1) a companion product cannot piggy-back off the warnings contained on the packaging of a completely separate product; and (2) a manufacturer is required to warn consumers of potential harms that are outside the scope of those generally contemplated by consumers.

***Morgan v. Dick's Sporting Goods, Inc.*, 359 F.Supp.3d 1283 (2019).**

Plaintiffs brought products liability claims against Dick's Sporting Goods ("Dick's") and Precision Shooting Equipment, Inc. ("PSE"), alleging their son, JM, sustained injuries after a fiberglass arrow he shot using a compound bow exploded, splintering into pieces. PSE manufactured the arrow. Dicks sold the fiberglass arrow and the compound bow.

Plaintiffs asserted the following claims: (1) negligence; (2) failure to warn; (3) strict products liability; and (4) breach of implied warranty. PSE moved to dismiss all of Plaintiffs' claims. As to the failure to warn claim, Plaintiffs advanced two theories: (a) an incompatibility theory and (b) a damaged arrow theory. The Court denied PSE's motion to dismiss after considering both.

First, under the incompatibility theory, Plaintiffs alleged there was a possibility of serious injury when PSE's fiberglass arrows are used with the compound bow at issue. Plaintiffs claimed this was a nonobvious foreseeable danger from the normal use of the product. In response, PSE argued Plaintiffs could not establish proximate cause because they did not read a warning contained on the compound bow packaging. The Court agreed with the assertion that "failure to read instructions or printed warnings will prevent a plaintiff from recovering on a claim grounded on failure to provide adequate warning of the product's potential risks." *Wilson Foods Corp. v. Turner*, 460 S.E.2d 532, 534 (1995). However, the Court explained that the fiberglass arrow packaging contained no warnings about use of the fiberglass arrow with a compound bow. Instead, the relevant warning was on the packaging of the compound bow. The Court held that a companion product cannot piggy-back off of the warnings on the packaging of a separate product. Because it was the arrow, not the bow, which allegedly caused the injury, PSE's duty to warn could only be satisfied by a warning on the arrow's packaging.

Next, under the damaged arrow theory, Plaintiffs alleged PSE failed to warn purchasers that a damaged arrow could fail, resulting in injury. In response, PSE argued Plaintiffs could not sustain a failure to warn claim given the "obvious nature of the danger inherent in the product at issue." The Court again agreed with PSE's assertion that it is not required to warn of product related dangers that are obvious or generally known. However, the Court held that a manufacturer is required to warn of potential harms that are outside the scope of harms generally contemplated by purchasers. A new fiberglass arrow exploding is not a danger regularly contemplated by purchasers of arrows. Therefore, the Court concluded it could not decide as a matter of law whether a warning was required and denied PSE's Motion to Dismiss on its failure to warn claim. The Court also denied PSE's motion to dismiss its negligence and strict products liability claims but dismissed Plaintiffs' breach of implied warranty claim.

PRODUCT DEFECT; DESIGN DEFECT; PROXIMATE CAUSATION; PLAINTIFFS' BURDEN OF PROOF; USE OF INFERENCES TO CARRY BURDEN OF PROOF: Trial court granted summary judgment for Conair, a heating pad manufacturer, finding Plaintiffs failed to present specific evidence giving rise to a triable issue of fact regarding proximate cause. Plaintiffs appealed. The Georgia Court of Appeals affirmed, holding "the evidence is insufficient as a matter of law to establish the causal connection between the design of Conair's heating pad and the fire." The evidence presented by Plaintiffs supports only an inference that the heating pad caused the fire; however, that inference "does not extend to the cause being the result of a design de

***Sheffield v. Conair Corp.*, A18A1032, 348 Ga.App. 6 (Ga. Ct. App. 2018).**

Plaintiff Sheffield and Plaintiff Fuller (collectively, "Plaintiffs") brought products liability claims against Conair Corporation ("Conair"), alleging the Conair heating pad used by Sheffield caused Plaintiffs' house to burn down. Conair manufactured the heating pad.

Plaintiff Sheffield purchased and was using the Conair heating pad to

relieve pain in her neck. Plaintiffs lived together in a rental home.

Plaintiffs sued for design defect, advancing three theories: (1) negligence; (2) strict liability; and (2) failure to warn. Conair filed a motion for summary judgment, contending Plaintiffs could not establish the heating pad caused the fire or that the fire was caused by a defect in the design of the heating pad. Conair based its motion on the testimony of its director of engineering investigations, who had inspected the remains of the heating pad. Based on his review, the director opined that the heating pad contained no defect in design or function and did not cause the fire. The responding fire department determined the breaker for the electrical outlet powering the heating pad had been tripped, and the fire chief opined the fire originated in the area of the heating pad. However, the fire chief could not be sure whether the heating pad itself was the cause of the fire. Consequently, the trial court granted Conair's motion for summary judgment. Plaintiffs appealed. The Georgia Court of Appeals affirmed.

The Court held Plaintiffs "had the burden to point to specific evidence giving rise to a triable issue of fact regarding the causal connection between Conair's alleged design defect and the fire" to survive summary judgment. The Court reasoned the record evidence "allows for only an inference that the heating pad caused the fire," and the inference did not extend so far as to prove a design defect caused the fire. Moreover, the Court explained that "when a plaintiff seeks to carry its burden of proof by inference, that inference must not only tend in some proximate degree to establish the conclusion, but render less probable all inconsistent conclusions." *See Ogletree v. Navistar International Transportation Corp.*, 535 S.E.2d 545, 550 (Ga. Ct. App. 2000). Here, Plaintiffs sought to carry their burden of proof by inference, but they were unable to point to any circumstantial evidence showing the heating pad caused the fire or that a defect in the design of the heating pad caused the fire. Because Plaintiffs could not point to specific evidence giving rise to a triable issue of fact regarding the causal connection between the alleged design defect and the fire, the Georgia Court of Appeals affirmed summary judgment to Conair.◆

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