

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume X, Issue IV
Spring 2024

*Reasonable Value of
Past and Future
Medical Damages*

*Any Juror Can Be a
"Nuclear" Juror*

*Misconceptions
about Mediation*

*A Psychiatrist's
Duties and
Privileges*

GDLA Honors Judiciary at 19th Reception

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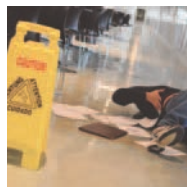
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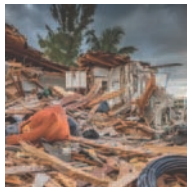
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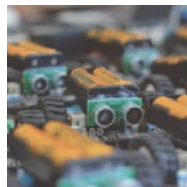
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President's Message

As I wind down my year as GDLA President, I wanted to share one of the most important roles that each leader in my shoes has filled since 2021. That year, through the generosity of several GDLA member law firms, we raised money to establish a Political Action Committee (PAC)—known as the GDLA Action Fund, Inc.—on which the sitting GDLA President serves. The donated funds enabled us to hire a lobbyist to give our members a voice and presence at the General Assembly.

The other side of the “v.” has been active at the Capitol for decades, and we heard from legislators that they often turn to GTLA for guidance when drafting and vetting legislation simply because they’re there.

Several of the same law firms contributed again over the past four years—and many members donated when paying their membership dues—enabling us to keep Kade Cullefer of Troutman Pepper Strategies working on our behalf. You’ll see a list of the law firms that have contributed within the last four years on page 50.

GDLA’s PAC is led by Jake Daly of Freeman Mathis & Gary in Atlanta. Serving with Jake and me are: Immediate Past President Dart Meadows of Balch & Bingham in Atlanta, Secretary Marty Levinson of Hawkins Parnell & Young in Atlanta, Vice President Tracy O’Connell of Ellis Painter in Savannah, Jonathan Adelman of Waldon Adelman Castilla McNamara & Prout in Atlanta, Barbara Marschalk of Drew Eckl & Farnham in Atlanta, and Dallas Roper of James Bates Brannan Groover in Macon.

Since the inception of our PAC, we’ve enjoyed some successes under

the Gold Dome. In our first year, 2021, we helped pass HB 714, although the law regarding time-limited settlement demands still needs more work. In 2022, we were instrumental in the passage of HB 961, which fixed the impact of the Supreme Court of Georgia’s decision in *Alston & Bird v. Hatcher*. The new law restored the right to apportion fault to non-parties in cases brought against only one defendant for cases filed on and after May 14, 2022. Although there have also been some disappointments along the way, we will continue fighting for measures that seek fairness and a level playing field for all parties in litigation.

This year’s session started out inauspiciously when Governor Kemp did not introduce his tort reform package as he’d intimated; however, we did get a couple pieces of legislation across the finish line: 1) SB 426 will amend the direct action statutes for accidents involving motor carriers by limiting the circumstances under which an insurer may be named as a defendant; and 2) SB 83 will amend O.C.G.A. § 9-11-67.1 by refining the requirements for settlement offers in cases involving motor vehicle accidents. These bills now await the Governor’s signature or veto with 40 days of sine die. If he does neither, the bills become law automatically. Unfortunately, bills to reinstate the seat belt defense and to revise the cause of action for negligent security did not pass, but we will be ready to fight for these bills next year.

The legislature may have adjourned sine die on March 29, 2024, around 1:00 a.m., but our work has not stopped. No doubt tort reform will be front and center in 2025, and

Continued on page 50



Pamela Lee

“
It is critically important that GDLA continues to build on its lobbying success, and we need your financial support to do that.
”

Member News & Case Wins

MEMBER NEWS

Freeman Mathis & Gary welcomed **James “Jimmy” Scarbrough** as a partner, as well as GDLA Past President **Walter McClelland** and **Peter Brown** as senior counsel in its Atlanta office. The trio was previously with **Mabry & McClelland** in Atlanta. Scarbrough’s practice is focused on products liability, wrongful death, transportation, professional negligence, negligent security, and premises liability. He has been lead trial counsel for both private and publicly traded companies in the transportation, food and beverage, manufacturing, community housing, and retail services industries, in addition to professional associations and non-profits. McClelland served as managing partner of Mabry & McClelland for over 20 years. He handles personal injury and catastrophic injury litigation. During his 52-year career, he has tried to verdict more than 125 jury trials in state and federal courts in Georgia. In 2021, McClelland received the GDLA Distinguished Service Award, the highest honor given by the association. Brown has been practicing more than 20 years, and handles premises liability, products liability, catastrophic injury/wrongful death, and professional negligence cases.

Swift Currie McGhee & Hiers announced the addition of **Molly Prodders King** as senior attorney in its Atlanta office. She represents clients in catastrophic injury and wrongful death cases involving products liability and premises liability. With prior experience in private practice and working for trial and appellate judges, she has handled all facets of litigation, from pre-suit through appeals, in both state and federal courts. **Paul Spann** has also joined the firm as an associate in

Atlanta. He practices general liability with a focus on appellate, automobile, premises, and products, as well as catastrophic injury and wrongful death insurance defense.

Nicole D. F. Simpson, formerly with **Mozley Finlayson and Loggins**, has joined the civil litigation defense practice group at **Callahan & Fusco** in Decatur. She focuses her practice on general insurance defense, automobile negligence, commercial vehicle negligence, premises liability, and trucking defense.

Hall Booth Smith announced the addition of **Tyler Normandia** as an associate in its Athens office. He joins the firm from **Cowsert Heath** in Athens. He focuses his practice on general liability, medical malpractice, and premises liability matters.

Waldon Adelman Castilla McNamara & Prout announced its promotion of four new partners: **Sarah Britt**, **Carolyn Lee**, **Morgan McGee**, and **Jack Parker**. Britt joined the firm in 2017 and specializes in insurance defense, insurance coverage, and civil litigation. Lee joined the firm in 2017 and practices in the areas of insurance defense and civil litigation. McGee joined the firm in 2016 and focuses on insurance defense, insurance coverage, and civil litigation. Parker joined the firm in 2017 and handles civil litigation and insurance defense.

Cozen O’Connor announced the promotion of **Luciana “Lucy” Aquino** to member in its Atlanta office. Aquino focuses her practice on commercial litigation and coverage matters and has experience representing corporate clients and national insurers in the hospitality, construction, transportation, and

retail industries. She has experience managing all stages of complex litigation matters, including class actions, and has represented corporations, retailers, business operators, and insurance companies against various personal injury, property, and contract claims.

Groth Makarenko Kaiser & Eidex (GMKE) in Atlanta announced that **Kevin James** has been elected to partnership. He joined the firm in 2020 as an associate after practicing at a prominent plaintiff’s personal injury firm. While at that firm, he obtained one of the top 100 plaintiff’s jury verdicts in the U.S. (\$52 million in a negligent security/premises liability case resulting from a shooting). Since joining GMKE and transitioning to the defense side, James has handled automobile and general liability cases with significant exposure and has tried multiple cases to juries. Of note, all of his trials to date have resulted in defense verdicts. His practice continues to focus on automobile, premises, and general liability defense.

Stone Kalfus announced the promotion of **Sheetal Brahmhatt** to partner; she is in the firm’s Atlanta office. Her practice focuses on defense of complex motor vehicle and trucking liability claims. The firm also announced the opening of offices in Park City, Utah, and Las Vegas, Nevada, with a team whose practice includes representing individuals and businesses involved in transportation, hospitality, gig-economy, construction, manufacturing, and adventure sports.

Drew Eckl & Farnham announced the promotion of **Sharon Stewart** to partner in its Atlanta office. Stewart focuses on defending employers, insurers, and self-insurers in workers’ compensation matters.

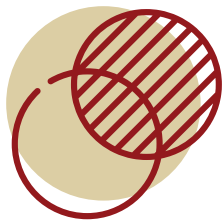
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Member News

Continued from previous page

Hawkins Parnell & Young announced the addition of **David Kolmel** as an associate in its Atlanta office. Kolmel focuses his practice on business disputes, construction litigation, HOA litigation and arbitration.

Balch & Bingham announced the elevation of **Meghan Pieler** to partner in its Atlanta office. Pieler focuses her practice on products liability actions and commercial disputes.

CASE WINS

GDLA President **Pamela Lee** of **Swift Currie McGhee & Hiers** in Atlanta obtained a great result for her client in the Superior Court of Fulton County in a case resulting from a rear-end collision at high speed on GA 400. The defendant admitted liability and the plaintiff claimed \$213,214.90 in past medical expenses. Plaintiff requested a verdict of \$3 million. Defendant made a statutory Offer of Settlement in the amount of \$453,000. Verdict for the plaintiff was \$314,000. The case is *Pritchard v. Bishop*, Civil Action File No. 2023CV375758, February 9, 2024.

Partners **Carrie L. Christie**, **Courtney M. Norton**, **Savannah L. Bowling** and associate **Tereza Kucerova** of **Rutherford & Christie's** Atlanta office secured summary judgment in a premises liability case in Gwinnett County where the plaintiff slipped and fell in the restroom inside a Burger King branded restaurant. The court agreed that the plaintiff's evidence did not show that the defendant had actual or constructive knowledge of any hazard, and that hearsay statements regarding the condition of the floor, from an unidentified declarant of unknown veracity, does not change the result.

The case is *Barnsetta Martin v. GPS Hospitality, LLC, ABC CORPORATIONS A-C and JOHN DOES 1-3*, Civil Action No. 23-C-00282-S5, State Court of Gwinnett County.

Groth Makarenko Kaiser & Eidex (GMKE) attorneys have enjoyed a series of successes recently. Senior associate attorney **Ankur Trivedi** secured a favorable verdict for his client in Fulton County with the jury rebuffing the plaintiff's attorney's plea for a multi-million-dollar verdict and punitive damages. Associate **Breonna Glover** served as second chair at trial. This suit arose out of a motor vehicle accident that occurred on October 29, 2021, on Hwy 316 in Oconee County, Georgia. The plaintiff was driving in the outside lane with the defendant travelling behind her. The defendant collided with the rear of plaintiff's vehicle. The collision sent Plaintiff's vehicle to the left and into an embankment. Defendant's vehicle veered into the right embankment and flipped over. The defendant, who was 19 years old at the time, was ultimately arrested for DUI following the accident. Negligence was admitted at trial.

The plaintiff went to the ER the day after the accident with complaints of left arm, shoulder and low back pain, where she was treated and released. She then treated with a chiropractor for approximately four months. At the end of her treatment, she was discharged. After 17 months with no treatment, she presented to an orthopedist and relayed significant lumbar and cervical spine pain. She underwent an ESI for her lumbar spine, and then ultimately had a 3-level Anterior Cervical Discectomy and Fusion (ACDF) surgery. At trial, she claimed past medical damages of \$371,925.43 and approximately \$320,000 in future medical damages pursuant to a life care plan indicating Plaintiff would require an ACDF surgery in the future.

At trial, the plaintiff testified regarding her injuries and treatment, as well as her limitations and the necessity for future treatment. She also presented the testimony of her husband as a before and after witness. Plaintiff also called the police officer who investigated the collision. Plaintiff presented Dr. Mark Flood, DO, who testified her cervical and lumbar herniations were caused by the subject collision. Plaintiff also presented Dr. Paul White, MD, who served only as a life care planner. Dr. Flood testified that, after reviewing all of Plaintiff's medical records, he agreed with Dr. Flood that Plaintiff had a 20 percent chance of requiring a second ACDF within the next 10 years.

The defense presented Dr. Barry Jeffries, MD who testified that (1) Plaintiff's post-incident MRIs did not show any markers for a traumatic injury; (2) Plaintiff's MRIs revealed on-going disc desiccation; and (3) the presence of osteophytes on both the cervical and lumbar spine further supported the conclusion that Plaintiff's spine had been undergoing chronic degeneration for at least two years.

In closing, Plaintiff's counsel asked the jury to return a verdict that included past medical bills of \$371,925.43 and a future ACDF surgery of approximately \$320,000. Plaintiff's counsel presented various equations to the jury to calculate pain and suffering, to be calculated over the course of her remaining 29-year life expectancy, all of which suggested a pain and suffering award in excess of \$2 million. Further, Plaintiff asked the jury to find that the case merited an award of punitive damages for the underlying DUI. Trivedi asked the jury to award the medical bills prior to the 17-month gap in treatment (\$19,684.07), plus a reasonable measure of pain and suffering. The jury deliberated for approximately six hours (over two days) before returning a verdict in favor of Plaintiff for \$19,684.07 in past medical bills and \$320,000 in past

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and future pain and suffering (\$339,684.07), which represents an amount less than Plaintiff's claimed medical damages and well less than the Plaintiff's lowest pretrial offer of \$500,000. The jury decided against awarding any punitive damages.

In the next case, GMKE partner **Jay Eidex** successfully defended a second appeal brought by opposing counsel in an Anti-SLAPP/First Amendment case, this one involving the award of attorney's fees. The case arose out of a suit that was filed in the Superior Court of Gwinnett County. In that action, attorney C. Napoleon Barnwell filed a defamation suit personally against GMKE associate Ankur P. Trivedi based upon a Bar Complaint and motion for sanctions filed by Trivedi against Barnwell. The trial court dismissed that suit, finding that the lawsuit was filed "in retaliation for the Bar Complaint filed against him and for the motions for sanctions filed against him."

Judge George Hutchinson dismissed the matter with prejudice. Barnwell appealed the dismissal and it was affirmed and the court issued its remittitur and returned the matter to the Superior Court of Gwinnett County where Eidex's claim for attorneys' fees under the Anti-SLAPP statute and O.C.G.A. 9-15-14 was still pending with the court.

Eidex presented the trial court with a Motion for Fees under both

O.C.G.A. 9-15-14(a), 9-15-14 (b) and 9-11-11.1 (b.1). Eidex argued that this matter and the conduct of Barnwell merited fees under each code section. He testified at the hearing that he spent 42.9 hours defending the suit, including the first appeal and that a reasonable hourly rate for his time was \$500 per hour. After oral argument, Judge Hutchinson entered an award of fees in Eidex's favor in the total amount of \$21,540. Judge Hutchinson entered findings as to each code section and specifically noted that O.C.G.A. 9-11-11 (b.1) or Georgia's Anti-SLAPP statute specifically authorized an award of fees for defending an appeal. Barnwell appealed the court's entry of fees arguing that the court erred in awarding fees, that the court erred in including in its calculation an award of fees for an appeal and that the amount of fees awarded was not reasonable.

The Court of Appeals rejected Barnwell's argument that no evidence supported a finding that he brought his action in bad faith under O.C.G.A. 9-15-14 (a). The Court of Appeals found that the trial court did not err in finding he had brought the action in bad faith and to harass Trivedi finding that "Barnwell's defamation action lacked any justiciable issue of law or fact." The Court of Appeals also upheld and affirmed the award of fees under O.C.G.A. 9-15-14(b). Finally, as to the fees under the Anti-SLAPP statute (O.C.G.A.

9-11-11.1(b.1), the Court found that under the statute the prevailing party is entitled to fees and Trivedi was so entitled to fees under the statute. Further the Court found that under *Rosser v. Clyatt*, 364 GA App 101 (2022) the Anti-SLAPP attorney's fees provision was interpreted to include appellate fees and thus the trial court did not err in awarding fees for the prior appeal. The Court dismissed Barnwell's arguments that *Rosser* was improperly decided.

Finally, Barnwell argued that the hourly rate for the fees awarded of \$500 was unreasonable. However, the Court of Appeals noted that Eidex testified to the reasonableness of his fees and Barnwell did not produce any evidence at the hearing as to what a reasonable fee would be. The Court noted that a "trial court is authorized to assess an award representing the reasonable value of the attorney's services rendered" and that amount "is not strictly limited to the amount that the attorney actually billed his client." The Court of Appeals affirmed the full amount of fees awarded (\$21,540) and found the trial court did not abuse its discretion in calculating the fees awarded.

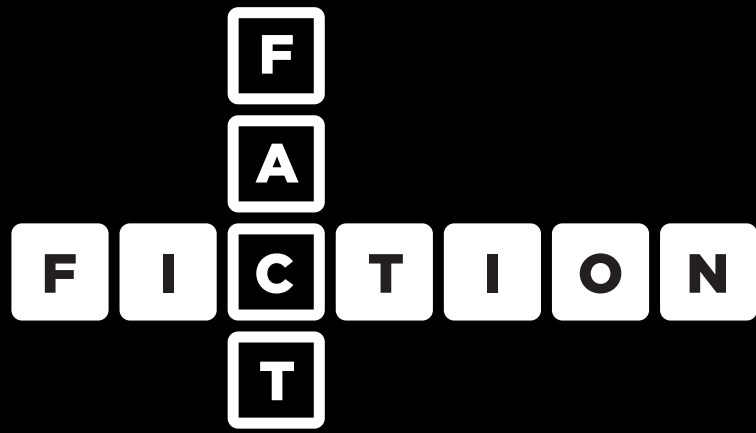
In the last case, GMKE partner **Paul Groth** won a big victory for his client in a case with significant claimed medical bills in Forsyth County. The suit arose out of a motor vehicle accident that oc-

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Making Numbers Make Sense



curred on June 21, 2021, when the defendant made an improper U-turn in front of the plaintiff's vehicle. The defendant was found to be at fault and admitted negligence at trial. The plaintiff went to the ER after the accident complaining of wrist and low back pain. Later that week, he began chiropractic treatment. At the chiropractor, he made complaints of memory and concentration issues, as well as his physical injuries. He also went to an orthopedist who treated him for lumbar and cervical pain. Ultimately, the plaintiff claimed a permanent traumatic brain injury (TBI). Plaintiff further claimed his injuries necessitated four surgeries: (1) neck injuries requiring a four-level fusion in the cervical spine; (2) lower back injuries requiring a two-level fusion in the lumbar spine; (3) a left knee injury which required arthroscopy and (4) the ultimate need for a total left knee replacement.

During the trial, the plaintiff's attorneys played the medical depositions of Dr. Doran (a neuropsychologist out of Maryland) who testified that the plaintiff's cognitive and memory issues were a direct result of the motor vehicle collision. He further presented Dr. Christopher Tomares who testified as to the necessity of the back and neck surgeries and related that necessity to the motor vehicle accident. Plaintiff also presented both Dr. Mathew Tombo and Dr. Scott

Barbour who testified that the left knee injuries were related to the motor vehicle accident and required surgical intervention. Groth called neuroradiologist Dr. Barry Jeffries, who testified that the diagnostic studies showed degenerative changes in the plaintiff's brain, neck, back, and no evidence of any acute injuries or aggravations of either.

During his closing, the plaintiff's attorneys asked the jury to award the past medical bills of \$159,935.43 and future medical bills of \$328,818.92 for a total of \$488,754.35 in special damages. Plaintiff asked for the jury to award \$1,950,000 in pain and suffering for a total jury award of just over 2.5 million. Groth asked the jury to award the ER bill of \$3,211.70. The jury deliberated for 2.5 hours and returned a verdict for the plaintiff in the amount the ER bill (\$3,211.70).

The case is *William W Powell vs Thomas Boyert*, State Court of Forsyth County CAFN 22SC-0266-A.

Waldon Adelman Castilla McNamara & Prout attorneys in Atlanta have notched a few victories of late. **Hilliard Castilla** and **Taylor Ward** recently secured a defense verdict on behalf of their client in Gwinnett State Court. This was a classic "who ran the red light?" case where four plaintiffs alleged that the defendant disregarded the traffic signal and

caused a significant collision. Plaintiffs claimed significant injuries, the most serious being a torn rotator cuff. By pointing out inconsistencies in the plaintiffs' description of how the accident occurred, Castilla was able to draw their credibility into question. The jury deliberated almost two hours before returning with their verdict in favor of an understandably jubilant defendant.

After a two-day trial in DeKalb County, **Ben Harbin** obtained a favorable outcome for his client. The case involved an admitted fault auto accident. Plaintiff claimed past medical specials of \$117,000. The plaintiff introduced the testimony of two treating orthopedists. At the close of trial, the plaintiff asked the jury to award past medical specials of \$117,000 and a reasonable amount for pain and suffering. The plaintiff's last pretrial demand was for \$100,000. The jury ultimately returned a verdict for \$37,500.

On January 12, 2024, following a four-day trial in Chatham County, **Jack Parker** and **Travis Meyer** obtained a defense verdict. Plaintiff claimed past medical specials of \$279,000 which included a neck surgery and \$51,000 in future medical expenses. The case resulted from a 2018 car accident involving a minor rear-end impact. Plaintiff was also involved in a subsequent accident three months after the subject accident. The defendant admitted fault but disputed

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WHERE COMPASSION MEETS INNOVATION

that the accident caused the extent of injuries the plaintiff claimed. Parker successfully impeached the plaintiff on cross-examination as to statements made at her deposition and in her medical records that showed her claims of severe injury had been greatly exaggerated. In closing argument, Meyer asked the jury to award an amount that would compensate the plaintiff for the early days of her treatment. The plaintiff introduced testimony from multiple witnesses including two of her treating physicians and a biomechanical expert. The defense introduced testimony from an orthopedic surgeon to counter plaintiff's expert testimony about the severity of her injuries. Plaintiff asked the jury to award over \$1.3 million in damages. The defendant's pre-suit statutory Offer of Settlement was \$70,000.

Following a three-day jury trial in Cobb County in March, GDLA Treasurer **Ashley Rice** with Waldon Adelman secured a verdict

below the claimed medical special damages. The plaintiff and Rice's client were involved in a 2018 rear-end accident with minor damage to the vehicles. Plaintiff did not report any injury at the scene but began treating within the week for shoulder pain he related to the accident. He ultimately underwent right shoulder surgery and several months of physical therapy. There was no evidence of any prior right shoulder problems and plaintiff incurred just over \$88,000 in medical bills. He had abandoned his previous claim for lost wages by the time of trial. Plaintiff asked the jury to award over \$690,000 for special damages and past/future pain and suffering. The defense relied upon expert review of MRIs and surgical images that indicated most of the findings in plaintiff's shoulder were due to wear and tear or otherwise pre-dated the accident. Following four hours of deliberation, the jury returned a verdict of \$55,000.

GDLA Past President **Warner Fox** and **Elliott Ream**, partners at **Hawkins Parnell & Young** in Atlanta, obtained a complete defense jury verdict in Gwinnett County on a premises liability and negligent supervision suit at the end of March 2024. The case stemmed from an incident at a Murphy USA gas station in Clayton County when one customer reversed her vehicle into a fuel dispenser, knocking it completely off the pump island and onto the unsuspecting plaintiff on the other side, which then slammed him into the concrete. The plaintiff sued Murphy USA, Murphy Oil USA, and the driver originally, but settled with the driver for her minimum limits. Plaintiff had approximately \$153,000 in past medical expenses and plaintiff's counsel asked for approximately \$3.5 million in closing argument. The case is *Callis/Burks v. Murphy USA, et al.* Civil Action File No. 20-A-0372-6 Gwinnett Superior Court. ♦




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Top 3 Winner since 2015

Welcome, New GDLA Members!

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

Mellisa Aleus

Dennis Corry Smith & Dixon, Atlanta

Dylan Annis

Vernis & Bowling of Atlanta, Atlanta

Celeste P. Armstrong

Law Office of J. Andrew Williams,
Brookhaven

Timothy Ryan Bennett

Bovis Kyle Burch & Medlin, Atlanta

Peyton Burkett

Ellis Painter, Savannah

Emma Kristine Clark

Huff Powell & Bailey, Atlanta

Lauren Alexandra Culver

Swift Currie McGhee & Hiers, Atlanta

Sarah Rose Daley

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Groth Makarenko Kaiser & Eidex, Du-
luth

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Susan Elizabeth Wilson

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Alec Young

Vernis & Bowling of Atlanta, Atlanta



All members are encouraged to recruit their colleagues to join the GDLA!

We have crossed the 800-member mark and continue to expand the voice of the defense bar in Georgia.

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

Click on the **Find a Defense Lawyer** tab to see if someone is already a member.

IN MEMORIAM: GDLA Past Presidents Wilbur Brooks and Pat Rice



We imagine Pat Rice (right) welcomed Wilbur Brooks into the heavenly realm much like he did at the 2017 GDLA Past Presidents Luncheon. Pictured between them is Pat's beloved wife, Susan.



(Left to right) Past Presidents Bo Chambers and Salty Forbes with Wilbur at the 2017 GDLA Past Presidents Luncheon.

GDLA lost two of its treasured leaders in January 2024: Patrick J. “Pat” Rice of Hull Barrett in Augusta and Wilbur C. Brooks, who was retired from the firm then known as Chambers Mabry McClelland & Brooks in Atlanta. We are grateful to have “A 50-Year History of the Georgia Defense Lawyers Association,” written in 2017 by Past President Morton G. “Salty” Forbes, who led the organization from 1991-1992. Forbes’ chronicle gives us a glimpse into the lives of these two leaders:

The 1989 Annual Meeting was held in Bermuda at the Princess Hotel in Hamilton. Pat Rice was President of the Association from 1989-1990. The Association increased its dues to \$55.00. The Trial Academy was held at Callaway Gardens. In 1990-1991, Wilbur Brooks was President. He attended the National Defense Organization’s meeting sponsored by DRI at the Sallishan Lodge on the Oregon coast. He also attended the National Leaders Conference held

in Williamsburg, Virginia. The Trial Academy was held at Callaway Gardens, and the Association celebrated its Silver Anniversary year at the Annual Meeting in Ponte Vedra in April. Wilbur convinced Lee Forbes [Salty’s wife and an acclaimed portrait artist] to create a logo for GDLA, which she did.

As part of GDLA’s Golden Anniversary, and to accompany Forbes’ historical account, each GDLA Past President was asked a few questions about their time with the organization. Below are the memories shared by Pat and Wilbur:

Patrick J. Rice

1989-1990 GDLA President

How did you become involved with GDLA?

I was first introduced to the Georgia Defense Lawyers by Gould Hagler, an early President. Interestingly, he was a senior, managing partner of another law firm in Augusta, the Fulcher Hagler firm, which represented more insurance companies than any firm in Au-

gusta at that time. Gould’s firm often had conflicts, and he would refer one of the conflicted insurance companies to me.

Eventually, he sponsored my membership in GDLA and introduced me to everyone in the organization from all corners of the State. His wife, Mary, did the same with the wives of the members and introduced my wife, Susie, to all of them. I could not have had anyone better to sponsor me. Everyone loved Gould.

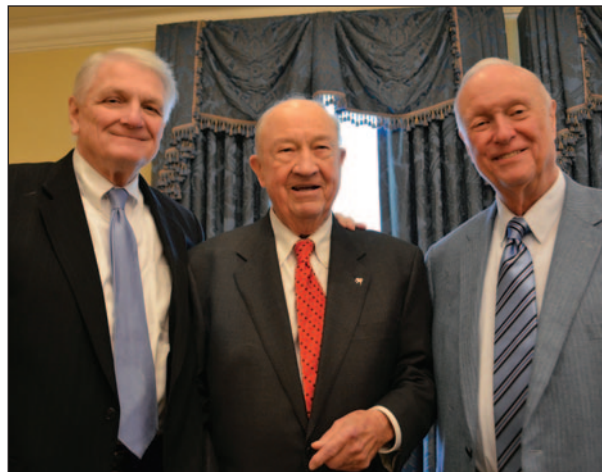
What is your favorite GDLA memory?

My early memories of GDLA centered around all the great places where the meetings were held. Neither Susie nor I had ever been to such grand venues as Bermuda, the Biltmore Forest, the Grand Hotel on the Gulf coast, Ponte Vedra, Sea Island and many, many more. Early on, I also was fortunate to speak on a variety of litigation topics at GDLA meetings and to contribute to the Law Journal. I thought I was “hot stuff.”

I have lots of stories about some of our famous members and their antics but those are best reserved for another time.



GDLA Past Presidents at the 25th Annual Meeting in 1991 in Ponte Vedra: (front row) Gould Hagler, Doug Dennis, George Grant, James Dunlap, Mac McLendon, and Bo Chambers; (back row) Pat Rice, Paul Painter, Bill Scrantom, Frank Love, Dick Richardson, Al Parnell, John Capers, Wilbur Brooks, Hubert Howard, Dave Burch, and Rick Marchetti.



(Left to right) Pat and Wilbur with Past President Bill Scrantom at the 2017 GDLA Past Presidents Luncheon.

One that can be repeated took place on the beach at Sea Island. Several of us were lounging around on the beach while our wives had gone shopping. We were enjoying a few “cool ones.” In the distance, we saw a young lady with a two-piece bathing suit (a little scandalous at the time) who appeared to be a true “10.” Just as she came alongside our position on the beach, and a few whistles and “flattering” remarks were beginning to emerge from our group, I recognized this mermaid as a young lady who had been a neighbor in my youth and was now the wife of one of Augusta’s most prominent and successful businessmen. He, also, was one of my firm’s best business clients!

Well, it was too late to silence a bunch of well-watered defense lawyers and the damage had been done. It took years to emerge from that dog house!

My participation in GDLA has been a true highlight in my legal career. I have made life-long friends and learned so much by virtue of that association. I would not trade that relationship for all the defense verdicts in the world. Thanks, folks. It has been a wonderful ride!

Wilbur C. Brooks

1991-1992 GDLA President

How did you become involved with GDLA?

During the time that Bill Scrantom was President (1972-1973), I was working as an associate at Henning Chambers & Mabry in Atlanta. The three name partners, Ed Henning, Bo Chambers and Speer Mabry, went to the 1973 GDLA Annual Meeting. During that meeting, Bill appointed Bo, with whom he was close friends, to the Board of Directors. When the trio returned to the office, they said, “This [Annual Meeting] is a good thing and you, associates, can learn from it. Next year, you’re all going.”

So, Walter McClelland, Pete Kintz, Ward Hull and I went to the 1974 Annual Meeting, and I’ve been a GDLA member ever since.

When George Grant from Macon was President (1983-1984), he appointed me to the Board of Directors. I served for a period of years and then became President in 1990. GDLA celebrated its 25th Anniversary during my tenure at the 1991 Annual Meeting in Ponte Vedra.

What is your favorite GDLA memory?

We held meetings at special places like the Grove Park Inn, when I was President, and later at Ponte Vedra and The Cloister on Sea Island. We had a good time, but we also learned things. We had a high degree of camaraderie in the whole organization and it was just a kind group of men—and women, too. We didn’t get women in right away, but we did eventually, and they were just as much a part as any of us.

At our meetings, when the whiskey was flowing freely, someone would request that I recite “Gunga Din,” so I did that and it became a tradition. We also had some good dancing. I was somewhat younger then than I am now and I really enjoyed jitter-bugging.

Anything else you’d like to share?

One of the things that I’m proud of is that GDLA put into effect a system of education long before the State Bar made CLE mandatory. We had been doing it on a voluntary basis, because we thought that the younger lawyers in our firms could benefit from the knowledge of more seasoned GDLA members, who we knew were the cream of the crop. Finally, GDLA was just a great organization to be in and I thoroughly enjoyed all of my years there. ♦

GDLA Files Amicus on Apportionment and Seatbelt Misuse in \$1.7B Ford Verdict Appeal

On April 1, 2024, GDLA filed a Motion for Leave with an Amicus Curiae Brief (the “Brief”) before the Georgia Court of Appeals in *Ford Motor Company v. Kim Hill and Adam Hill*, Appeal No. A24A0657. GDLA seeks leave to file its Brief in support of Appellant Ford Motor Company (“Ford”).

Hill is a vehicle crashworthiness case arising from an April 3, 2014, accident involving a Ford F-250 Super Duty Pickup (the “F-250”). At the trial court level, plaintiffs in Hill argued that the design and manufacture of the F-250’s roof was defective and unreasonably dangerous because its roof collapsed during a violent rollover, causing the death of plaintiffs’ decedents. According to plaintiffs, Ford knew of the alleged defect but refused to rectify it.

The initial trial began in March 2018. However, after two weeks, the trial court declared a mistrial after determining that Ford had allegedly violated an in limine order. Plaintiffs moved for sanctions, requesting that the trial court preclude Ford from contesting liability. In July 2018, the trial court entered an “Order Granting-in-Part Plaintiffs’ Post-Trial Motion for Sanctions and Assessing Jury Costs Against Defendant” (the “Sanctions Order”).

The Sanctions Order established as a matter of law the following six critical facts: (1) the F-250’s roof was defectively designed and dangerously weak; (2) the F-250’s roof was susceptible to collapse or crush during a foreseeable rollover, which would or could result in death or serious injury; (3) the rollover in *Hill* was foreseeable; (4) Ford’s conduct in selling F-250s with this roof design amounted to a willful, reckless, and wanton disregard for life, for the purposes of

the statute of repose; (5) Ford knew of the dangers posed by the roof design and had a duty to warn the public but willfully failed to do so; and (6) the defective roof design resulted in the death of plaintiffs’ decedents. Due to the trial court’s Sanctions Order, the jury was precluded from hearing key evidence and argument not just as to the alleged product defect but also regarding proximate cause, potential fault of the plaintiffs’ decedents, and whether punitive damages were warranted.

The jury in the second trial subsequently awarded plaintiffs \$16 million for wrongful death, \$8 million for pain and suffering, \$22,500 for loss of the F-250, \$16,000 for funeral expenses, and \$1.7 billion in punitive damages against Ford.

Ford has appealed numerous issues arising from the trial court’s decisions, including the Sanctions Order, the punitive damages award, and the admission and exclusion of certain evidence. GDLA has sought leave to file a Brief focused on two critical issues: (1) the trial court’s decision to preclude Ford from presenting evidence of comparative fault under O.C.G.A. § 51-12-33(a) and (2) the trial court’s exclusion of evidence of seatbelt misuse under O.C.G.A. § 40-8-76.1(d).

In its Brief, GDLA urged the Court of Appeals to hold that the trial court had erred by precluding Ford from presenting evidence of comparative fault. Specifically, GDLA argued that evidence show-

ing that one of plaintiffs’ decedents, Mr. Hill, the owner and operator of the F-250, had improper load range tires installed on the F-250, did not drive in accordance with generally accepted driving principles, and was driving under the influence of benzodiazepines, was relevant and should have been admitted for a full and fair assessment of comparative fault. Further, GDLA argued that evidence showing plaintiffs’ decedents had “tucked”

their seatbelts under their arms (rather than wearing them across their chests and shoulders as intended) should have been admitted at trial because this constitutes evidence of misuse, not non-use, of a seatbelt. O.C.G.A. § 40-8-76.1(d) excludes only evidence of the “failure” to use a seatbelt, and the Supreme Court of Georgia has noted that “the statute does not restrict consideration of seatbelt use.” *Domingue v. Ford Motor Co.*, 314 Ga. 59, 64 & n.5 (2022).

The Court of Appeals is scheduled to hear oral arguments in this case on June 18, 2024.

GDLA thanks members Jonathan Friedman, Gary Toman, and Christopher Garten of Weinberg Wheeler Hudgins Gunn & Dial, Atlanta, and GDLA Secretary and Amicus Curiae Chair Emeritus Martin Levinson of Hawkins Parnell & Young, Atlanta, who co-authored the brief. The GDLA Amicus Committee is led by Co-Chairs Elissa B. Haynes of Freeman Mathis & Gary, Atlanta, and Philip Thompson of Ellis Painter, Savannah, as well as Vice-Chair Patrick Silloway of Balch & Bingham, Atlanta. ♦





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

On April 4, 2024, GDLA filed an Amicus Curiae Brief (the "Brief") before the Georgia Court of Appeals in *William Cole Redfearn v. Jaade Moore, individually and as the administrative of the estate of Theodore Moore, Jr., and Sierra Moore*, Case No. A24A1028.

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

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

1. State Farm failed to have payment endorsed by both plaintiffs, as required by the offer for acceptance;
2. The offer required payment made out to "Jaade Moore, Sierra Moore, the Estate of Theodore Moore, Jr., and Gunn Law Group, LLC," and State Farm's payment was made out to "Jaade Moore, Sierra Moore, the Estate of Theodore Moore Jr and Gunn Law Group LLC";
3. State Farm included the claim number, the named insured, and the date of loss on the check when the offer specified no extraneous information should be included;
4. State Farm sent payment 8 days after the offer, when the offer specified it must be received 41 days after receipt of the offer;
5. The release did not comply with the terms of the offer because it state the claimants "do hereby release" instead of stating the release was meant "to release William Redfearn;"
6. The release did not comply because it did not include a comma before "as the Administrator" in the signature line for Jaade Moore;
7. The release did not comply because there was a typo adding a comma between Jaade and Moore; and
8. The release did not comply because the release included blanks for dates where the offer prohibited blanks for anything but the signature line.

State Farm and Redfearn moved to enforce the settlement. Applying the common law principles articulated in *Grange Mutual Casualty Co. v. Woodard*, 300 Ga. 848 (2017), the trial court held that the plaintiffs were "the master of [their] own offer" and, because State Farm's acceptance did not comply with the offer, no settlement was reached.

In its Brief, GDLA argued the trial court erroneously applied the standard from *Woodard*, as it was abrogated by the 2021 version of § 9-11-67.1, as already recognized by the Court of Appeals. GDLA urged the Court to recognize the common law principles relied upon by the trial court had been displaced by § 9-11-67.1, which provides a statutory scheme that applies to every offer for settlement made for claims arising out of motor vehicle collisions.

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

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

GDLA also argued interpreting subsection (b)(1) to allow additional terms as long as there was ex post written agreement to them would render subsection (c), which states "[n]othing in this Code section is intended to prohibit parties from reaching a settlement agreement in a manner and under terms otherwise agreeable to both the offeror and recipient of the offer," as nothing more than "mere surplusage." If subsection (b)(1) is interpreted to require ex ante agreement to the inclusion of additional terms in an offer, subsection (c) is properly read to confirm that any agreement reached through such an offer is valid.

Continued on page 49

GDLA Files Amicus on When an Action is “Brought” Under Pre-2022 Version of O.C.G.A. § 51-12-33(b)

On April 5, 2024, GDLA filed as a matter of right the Amicus Curiae Brief of Georgia Defense Lawyers Association in Support of Appellant AU Medical Center, Inc. (the “Brief”) before the Georgia Court of Appeals in *AU Medical Center, Inc. v. Dale*, Appeal No. A24A1027.

This is a medical malpractice case where the plaintiff initially filed suit against seven defendants with divisible fault but, following a series of settlements and dismissals, the sole remaining defendant before trial was Appellant Augusta University Medical Center, Inc. (“AUMC”).

The plaintiff obtained a pre-trial ruling that the jury would be authorized to apportion fault between non-parties, but pursuant to *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 312 Ga. 350, 358 (2021) (holding that a reduction of damages apportioned to a non-party is only authorized “where an action is brought against more than one person”) and *Georgia CVS Pharmacy, LLC v. Carmichael*, 362 Ga. App. 59 (2021) (holding in the alternative that courts should look to party status at the time of trial to determine whether a reduction of damages is authorized), the judgment entered against AUMC would not be reduced by the percentages of fault apportioned to any non-party.

The trial court concluded that (1) under the Court of Appeals’ opinion in *Carmichael*, “O.C.G.A. § 51-12-33(b) does not allow the amount of damages to be reduced based on non-party fault in an action in which only one named defendant remains at the time of trial[;]”; (2) the Georgia Supreme Court, upon certiorari review of *Carmichael*, noted “whether O.C.G.A. § 51-1233(b) would have applied under these circumstances



[i.e. where a plaintiff sues more than one defendant but goes to trial only against one] remains an open question.”; and (3) “[t]he Supreme Court of Georgia having declined to reach the issue, this Court has no analysis of the former statute’s applicability in circumstances such as these to apply except for that found in the decision of the Court of Appeals of Georgia [in *Carmichael*].” AUMC obtained a certificate of immediate review and the Court of Appeals granted AUMC’s application for interlocutory review.

On appeal, AUMC argues that the trial court erred because it did not follow the plain language of the pre-2022 version of O.C.G.A. § 51-12-33(b), which authorizes a reduction of damages for fault apportioned to non-parties “where an action is brought against more than one person.” AUMC argues that to “bring” an “action” has a plain, well-established meaning, which is to commence a lawsuit. And, here, plaintiff commenced suit against “more than one person” by suing seven defendants. AUMC argues that the Court of Appeals’ alternative holding in *Carmichael* was erroneous because it did not analyze the plain language of Section 51-12-33(b) and, instead, cited inapposite authority interpreting a materially different prior version of Georgia’s apportionment statute.

AUMC also argues that *Carmichael* is no longer binding authority in any event, given that, upon certiorari review, the Supreme Court disagreed with much of the Court of Appeals’ reasoning and concluded that the question of when an action is “brought” is an “open question” under Georgia law.

In its Brief, GDLA urges the Court of Appeals to disavow the alternative holding in *Carmichael* and hold instead that an action is “brought against more than one person” when the plaintiff commences suit against more than one person. In other words, the pre-2022 version of O.C.G.A. § 51-12-33(b) authorizes a reduction of damages based on apportionment of non-party fault when a plaintiff initially sues multiple defendants, regardless of how many defendants remain at or soon before trial.

GDLA supplements AUMC’s brief with additional citations to authority and the following arguments: (1) courts nationwide—not just in Georgia—have held universally that “brought” refers to the commencement of an action; (2) the General Assembly’s use of the present tense verb “is” in Section 51-12-33(b) does not alter the temporal quality denoted by the word “brought;” and (3) subsection (d) of Section 51-12-33 would be superfluous and non-harmonious if “brought” refers to party status at the time of trial.

The Court of Appeals denied requests for oral argument and briefing will likely be completed in early May.

GDLA thanks member Matthew D. Friedlander of Webb Daniel Friedlander, Atlanta, who authored brief. ♦



A Psychiatrist's Duties and Privileges: The Law in Georgia



By John Hall and Sheila Kazemian
Hall Booth Smith, Atlanta

I. Introduction

The law in Georgia regarding the duties that a psychiatrist owes to patients and the public is constantly evolving. Mental health professionals must be diligent not to break psychiatrist-patient privilege and to understand what the law requires when it comes to protecting the public from potentially dangerous individuals. This article is meant to serve as a guide on the current law in Georgia regarding psychiatric duties. Part I focuses on the psychiatrist-patient privilege, while Part II discusses the development of a psychiatrist's duty to warn or protect third parties. Finally, Part III examines the process by which mental health professionals may involuntarily commit patients who may be dangerous to themselves or others.

II. Psychiatrist-Patient Privilege

The psychiatrist-patient privilege is codified in O.C.G.A. § 24-5-501, and states that:

(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

...

(8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that pa-



tient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection[.]

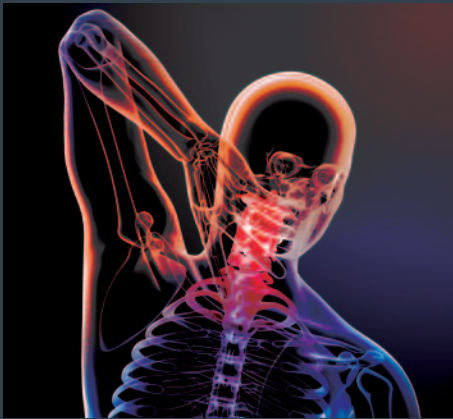
In Georgia, there is no stronger privilege than the privilege between a patient and his or her psychiatrist.¹ "The purpose of the privilege is to encourage a patient to talk freely without fear of disclosure and embarrassment, thus enabling the psychiatrist to render effective treatment of the patient's emotional or mental disorders."² Psychiatrists stand out among other physicians, as there is a special need for confidential communications.³ In fact, Georgia law distinguishes between psychiatrists and other types of physicians with regard to patient communication. For example, the non-psychiatric medical records of patients are also privileged; however, this status can be waived once the patient places his or her medical conditions at issue.⁴ Psychiatric privilege, on the other hand, can only be waived by "decisive and unequivocal" action and not by implication through conduct.⁵ Thus, privilege protects the

patient by providing for more useful and competent treatment; as such, only the patient may waive his or her privilege.

Privilege is so strong that it even continues after the death of a patient, disallowing the patient's estate from waiving psychiatric privilege.⁷ The Supreme Court recently noted in *Cooksey v. Landry* that the trial court, with regard to a deceased patient, is not "authorized to require the production of privileged communications contrary to [the psychiatric privilege statute]."⁸ To do so, would allow courts to subvert the legislatively enacted ban against disclosing confidential communications without the patient's consent.⁹ However, the trial court may determine whether a deceased patient impliedly waived privilege before death, unlike a living patient who must affirmatively consent to the waiver.¹⁰

Georgia's "discovery and evidence codes, as well as our case law, . . . set extremely strict limitations on the release of mental health records."¹¹ Communications between a psychiatrist and patient

Continued on page 52



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Labor and Employment Case Law Update

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



A recent report and recommendation from the U.S. District Court for the Northern District of Georgia underscores the importance of attacking an employee's proffered comparators for employment discrimination and retaliation claims at the summary judgment stage.

In *Cassandra Parks Stewart v. Circle K Stores Inc.* and *Rene Rosado-Rodriguez*, Civil Action No. 1:22-cv-03790-ELR-RDC, 2024 U.S. Dist. LEXIS 15565 (N.D. Ga. Jan. 29, 2024), the Honorable Regina D. Cannon, U.S. Magistrate Judge for the Northern District of Georgia, recommended that summary judgment be granted in favor of the defendants on all claims alleged in the plaintiff's complaint.

The complaint, which was initially filed on September 20, 2022, alleged claims for race discrimination under 42 U.S.C. § 1981 ("Section 1981") and retaliation under the Fair Labor Standards Act (the "FLSA"), 29 U.S.C. § 215(a)(3).

Plaintiff, an African-American woman, began working as a customer service representative for Circle K in 2017 and reported to a store manager, Lula Sweat ("Sweat"). Eventually, Plaintiff was promoted to assistant store manager and then, in 2019, to store manager when she was assigned her own store. During this time, Defendant Rene Rosado-Rodriguez ("Rosado") became the area's market manager and acted as Plaintiff's direct supervisor.

As part of Plaintiff's job duties, she was required to staff the store, ensure coverage for shifts, manage paperwork, assist employees, and make bank deposits. Store man-

agers also have to stay within certain parameters for labor budgets, which is monitored by area market managers. Store managers generally work about 50 hours per week, but may work more depending on staffing and business needs.

During her employment, Plaintiff alleged she was asked by Rosado to modify her recorded hours to reflect she only worked 50 hours, which would result in Plaintiff's not being paid for time she worked. Plaintiff refused and alleged this refusal later formed the basis for her termination.

In 2019, Plaintiff was verbally warned for failing to properly manage her labor budget and, in 2020, she was put on a performance improvement plan following the results of an in-store audit. In February 2020, issues with Plaintiff came to a head when she forgot to make a bank deposit. Plaintiff admitted she knew bank deposits should be made daily under company policy. The next day, on February 25, 2020, Rosado terminated Plaintiff and the instant action followed.

Following discovery, Defendants moved for summary judgment on all claims. With respect to Plaintiff's Section 1981 claim, Defendants argued that Plaintiff could not meet her burden under the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973), because she did not present evidence of a similarly situated comparator, nor did she present sufficient evidence to survive summary judgment under the "convincing-mosaic" framework.

Responding to Defendants' summary judgment motion, Plaintiff proposed two comparators in support of her *prima facie* case under Section 1981: Cassandra Perry ("Perry"), a Caucasian woman and Circle K store manager, who failed to make a timely bank deposit; and Michelle Long ("Long"), a Caucasian woman who worked as Plaintiff's store manager, who Plaintiff was told had failed to timely make a bank deposit. However, the Court found that these comparators were not "similarly situated in all material aspects" as required under *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1220-21 (11th Cir. 2019) (en banc).

First, Perry did not have a comparable employment or disciplinary history to that of Plaintiff. At the time Plaintiff was terminated, she had received a write-up and was on a performance improvement plan. Furthermore, Perry was a dual store manager at the relevant time and was assisting another manager at the time of her missed deposit, along with needing to take sick leave when leaving on the day of the missed deposit.

As to the other comparator proposed by Plaintiff, Long, there was little evidence in the record as to Long's disciplinary history, other than Plaintiff's testimony that was not supported by firsthand knowledge. Furthermore, Long was only an assistant store manager at the time, meaning that her job duties differed from that of Plaintiff. In all, the Court found that the lack of any proper comparators meant that Plaintiff could not make out her *prima facie* case under Section 1981.

The Court went on to examine Plaintiff's pretext argument in order to rebut the legitimate, non-discriminatory reasons provided by Defendants. Plaintiff's own admission, that she violated Circle K's bank deposit policy, undermined any argument that Circle K's reasons for firing her were pretextual. In moving through pretext, the Court analyzed Plaintiff's Section 1981 claim under the convincing-mosaic theory, citing to *Jenkins v. Nell*, 26 F.4th 1243, 1250 (11th Cir. 2022). In comparing the present case to *Jenkins*, the Court found that the evidence in *Jenkins* was more extensive and more probative. For example, in *Jenkins*, the supervisor made racially based comments and the plaintiff did not get to explain himself during an investigation into the improper conduct at issue. Furthermore, after the plaintiff in *Jenkins* was terminated, an African-American woman took over her position. For those reasons, Plaintiff's race discrimination claim under Section 1981 could not survive under either theory.

The remaining claim for the Court to consider was Plaintiff's FLSA retaliation claim. Defendants argued that Plaintiff had not engaged in statutorily protected activity, nor could she show the requisite causal connection or any evidence of pretext. The Court immediately moved to the pretext portion of the analysis for purposes of the FLSA claim, because even if Plaintiff established a *prima facie* case of FLSA retaliation, she still could not show that Defendants' legitimate reasons were pretextual, as previously addressed with the Section 1981 claim. Just as summary judgment was proper on Plaintiff's Section 1981 claim, the Court recommended that summary judgment be granted in Defendants' favor for Plaintiff's FLSA retaliation claim. The report and recommendation will be sent to the

Honorable Eleanor L. Ross, U.S. District Court Judge for the Northern District of Georgia, for review and possible adoption as the opinion and order of the District Court.

The case serves as a good reminder for attorneys defending management and corporations in the importance of attacking a plaintiff's proposed comparators at the summary judgment stage. While comparators are part of the burden-shifting framework set out in *McDonnell Douglas Corp.*, distinguishing similar employment actions can also undermine a plaintiff's argument of pretext. For example, a plaintiff may argue that inconsistent application of an internal company policy is evidence of pretext. If it can be shown that this policy was not applied inconsistently, but the factual scenarios differed from those of plaintiff, the

plaintiff will have a harder chance of convincing a court that the legitimate reasons offered for the ultimate employment action are false. ♦

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

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

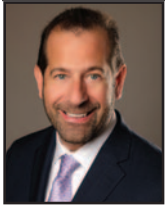
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Reasonable Value of Past and Future Medical Damages

By John E. Schneider and Cara M. Scheibling
Avalon Health Economics



The medical damages component of personal injury cases and product liability cases has grown substantially in recent years. While exponential growth has been observed in alleged past medical expenses, due to substantial growth in the likelihood of surgical procedures, like back surgery, there has also been tremendous growth in the dollar amount of life care plans (“LCPS”). One way to manage these escalating damages is to calculate the reasonable value of past and future medical expenses.

Prices. In most U.S. industries, prices serve as a sufficient measure of “value.”¹ According to economic theory, prices convey most of the information consumers need to make a purchase. However, in the health industry there is widespread agreement among industry experts and health economists that prices (or “charges”) are *not* reflective of value.² Indeed, there is a long tradition in the U.S. medical care industry of health care providers submitting bills and charges for services rendered but accepting much less than those amounts in full satisfaction of those charges.³

History. The reasons for this are twofold. First, as the U.S. health care system grew rapidly following World War II, the industry was largely organized as non-profit. As the industry expanded, policymakers put more pressure on non-profit entities to show that they were providing sufficient levels of “charity” care (or alternatively carrying sufficient levels of “bad debt”) to justify their tax-exempt status; that is, charity care and bad debt were considered forms of “community benefit.”⁴ One



way for hospitals and other health care entities to report high levels of charity care was to keep their charges high, negotiate *lower* rates on a per case basis, and classify the difference as either charity care or bad debt.⁵ Although the industry now contains a mix of non-profit and for-profit entities,⁶ such pricing behavior has largely continued.⁷ Second, health care entities generally find it more effective to bargain and adjust from an arbitrarily high chargemaster (i.e., “price list”) rather than a price list more reflective of fair market value.⁸

Implications. This widespread practice suggests that medical prices have, at best, only a loose relationship with value, reflected by the high rate of variation in prices for the same procedures.⁹ Even the mainstream media reports on this unusual custom.¹⁰ For example, the *New York Times* reported that “A hospital in Livingston, N.J., charged \$70,712 on average to implant a pacemaker, while a hospital in nearby Rahway, N.J., charged

\$101,945 ...” to implant the same pacemaker. These hospitals are very near one another and are both considered within the same New York City metropolitan area, yet one is charging nearly 50 percent more than the other for the exact same service. It is highly unlikely that these two hospitals have cost structures that differ by 50 percent. Instead, this variation is driven by the “disconnect” between charges, costs, and fair market value.¹¹

Framework. There is a common concept in the health services field referred to as “usual, customary, and reasonable” (“UCR”).¹² This is a valuation method commonly used by health care providers, employers, and purchasers to assess the reasonable value of medical care products and services; “usual” refers to whether the charge is the provider’s usual charge; “customary” refers to whether the charge is aligned with peer providers in the same geographic area providing the same service; and “reasonable” refers to whether the charge reflects the typical “transacted amount” for the service in question (i.e., the “fair market value”). In most states, case law states that plaintiffs are entitled to recovery of the *reasonable value* of medical expenses.¹³ Let’s look at each of these UCR components more closely.

Usual. Charges for medical services are often considered “usual.” When a patient or expert calls a provider to ask them their charges for a particular service, the provider will simply report amounts from their price list or “chargemaster.” These are the provider’s “usual” rates. It is worthwhile to

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Reconstructing Reality in a Digital Sandbox

By Charles A. Fox
Engineering Systems Inc. (ESi)

Introduction

The legal landscape is ever evolving and with it, the tools we use to present our cases. Buzz Lightyear’s iconic phrase, “To infinity and beyond!” may belong to the world of animation, but it also metaphorically represents the bounds we are pushing in legal visualizations. In our courtrooms, 3D animations have transitioned from novel to necessity, playing a pivotal role in elucidating complex facts for juries and judges in many cases. And this is not due to their entertainment value. Animations built on a solid foundation of data can accurately depict events in detailed ways not accessible via photos, security camera footage, or other forms of recording.

Advancements in technology have transformed these animations from illustrative to evidentiary. The 3D scans we employ today offer dimensional precision that allows technologists to build large scenes with millimeter precision. The proliferation of digital recordings from various sources—security cameras, dashcams, and smartphones—allows us to integrate this data into a 3D framework, crafting immersive and reliable reconstructions of events.

Modern 3D animation technology empowers the creation of scaled virtual worlds, testing grounds for hypotheses against the tangible reality of an incident site. This is not merely a theoretical exercise; it’s a rigorous investigative process upheld by legal and technical experts to dissect and understand the dynamics of an event.

Gone are the days when 3D models were based on a handful of measurements and a dose of crea-

tivity. Today, we harness laser scanners and drones that capture millions of points that are used to define a precise 3D model of an accident scene. Accurately combined scene and object models are then used in an active recreation of an incident, incorporating the crucial element of time. These scenes allow for the analysis of vehicle paths, human movement, and operational machinery and can be further enhanced with environmental factors such as lighting and weather, crucial for understanding visibility and other conditions pertinent to an event.

Developing Visualizations in the Digital Sandbox:

“Visualization” is a broad term that encompasses the result of these investigatory tools. The digital sandbox is a real-time version of the data as it is accumulated. Using a computer, stakeholders interact with the relevant data points like a meticulous child would construct a scene in a sandbox. This allows stakeholders to layer in relevant information anchored by scene geometry and motion. Deliverables from the digital sandbox are often animations simply because the animation is portable, unchangeable, and is easily shared with other parties.

Phase 1: Data Gathering - Capturing the Scene

As an attorney, you know that reconstructing an event for the courtroom isn’t just beneficial—it’s often critical. The starting point is data collection that paints a detailed and accurate 3D picture of the incident’s environment. Whether it’s United States Geolog-

ical Survey (USGS) data of landscapes, drone-captured images of an intersection, or laser scans of vehicles, each dataset is integral to understanding the environment and objects that led to a loss.

- **Scene Geometry:** Created from various sources like USGS terrain data, survey data, and photogrammetry from drones or laser scanners such as FARO Focus or Leica RTC360.
- **Object Geometry:** For vehicles or machinery, we might use manufacturer CAD data if available or 3D models verified with laser scanners.
- **Motion:** Every object that moves in a scene does so in a specific way on a precise timeline. Video can be the gold standard when you know how to reintegrate it into a 3D environment and ensure accurate timing.

Incident data is perishable and immediate scanning of the scene ensures evidence preservation however, this is frequently not possible. We often rely on documentation like first responder photos and video recordings from security cameras that capture information at or near the time of the incident. This photographic and video evidence is invaluable when combined with scan data to reconstruct a virtual scene as it was at the time of the accident even when the laser scan data is captured well after the time of the event.

Phase 2: Analysis Entering the Sandbox in Real-Time

A digital sandbox doesn’t just show a scenario—it immerses you

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Misconceptions about Mediation

By Lyle Griffin Warshauer

Henning Mediation & Arbitration Services

Over the past several decades, mediation has become increasingly helpful in resolving disputes. In many instances, it is, in effect, the new way to litigate, meaning it is the sole forum utilized for resolving a dispute, not merely an adjunct to the court proceeding. Yet, despite the growth in the alternative dispute resolution industry, several misconceptions about mediation hinder people from considering it a viable option for conflict resolution. Understanding these misconceptions is crucial for individuals considering mediation because it can be a valuable tool that empowers parties to take control of their conflicts and find mutually acceptable resolutions in a collaborative and respectful environment.

Here are some of the most common misconceptions and explanations for why these concerns are generally misplaced.

Myth 1: Mediation is Just Like Trial

Mediation is not like a trial, and people should not approach it like one. An essential component of mediation is that it is both voluntary and non-binding. While there are certain court-ordered mediations, the parties are nevertheless not forced to reach an agreement simply by participating.

The court is a public forum. Mediation is a private process solely between the parties. One of the most essential characteristics of mediation is the requirement of confidentiality. This addresses another mediation myth that what is said in mediation can be used at trial. It cannot. So, rest assured that



“what happens in mediation stays in the mediation.” Notably, this crucial element of the mediation process was fortified in Georgia with the adoption of the Uniform Mediation Act.

Because mediation is not a trial, the advocacy skills are quite different. And it is important to consider who your audience is. Many people think the mediator is the focus, but that is far from true. The audience is the other side or party—those with whom you seek to find common ground. The process necessitates the free flow of information. While each side necessarily must present their view in the light most favorable to their cause, mediation is not an adversarial process. In a trial, each side takes a position, and everything said and done is intended to further that position to the detriment of the other side. In mediation, the goal is to reach a common solution, not to convince a jury to find your way.

In litigation, some attorneys find it beneficial to hold back information to maximize its effect when offered at trial. Mediations function best when each side has made a meaningful effort to educate the other side. Mediations function poorly when each side relies exclusively on its own claims or defenses.

Unlike a trial, there is no winner or loser in mediation; a successful mediation results in both sides achieving what they need to resolve the dispute satisfactorily.

Myth 2: Mediators Decide the Outcome

There is a misconception that mediators act as judges and impose solu-

tions. Mediators are neutral facilitators who assist parties in finding their own resolutions. The outcome is in the hands of the disputing parties; the mediator’s role is to guide the process.

Mediation is not arbitration. The mediator is a facilitator, not a decider. The mediator does not make factual or legal determinations. Unless the parties seek an evaluative mediator, in most instances, the mediator doesn’t even make recommendations aside from offering suggestions for conducting the negotiations themselves. And, because mediations are most effective when there is a free flow of information, the mediator may encourage the parties to offer information that might prove useful in altering the view of the other side. However, the mediator must be careful not to reveal any confidences that a party does not want to share. And, of course, counsel is very important to the process. The attorney knows the case and is still the advocate for the client. The mediator’s job is not to ensure that a party’s rights or interests are protected. In fact, the parties are entitled to make decisions that are not in their best interest.

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The Three-Legged Stool of Evaluating Ground-Level Falls for Premises Liability

By Cliff Bishop, Regan Lawson, and Ian Campbell

Exponent



Introduction

Ground-level slips, trips, and falls continue to be a common source of injury claims reported in the United States.¹ Such injuries can occur at home, work, within a

place of business, or even while walking in the public right-of-way. While the cause of an incident may initially appear straightforward, analyzing the many potential causal factors behind an injury associated with a slip, trip, and fall event often requires a multidisciplinary approach. For example, evaluating a particular incident could require code analysis, assessing what was perceptually and behaviorally available to the claimant, and analyzing injury mechanisms and fall kinematics.

This article provides the technical background as to the role these three disciplines can play in evaluating slip, trip, and fall injury claims, which can be thought of as a “three-legged stool” in that failing to consider any leg of the stool could cause the evaluation of a claim to fall to the ground.

Code Compliance

One of the initial concerns when a slip, trip, or fall occurs is code compliance at the incident location. In general, for a location to be code-compliant, it will need to satisfy regulatory statutes, including all relevant references therein. To determine which regulations are applicable, the first step is usually to determine who is the “authority

having jurisdiction” (AHJ); e.g., do county or city ordinances govern? Once that is determined, the next consideration is investigating local, municipal law. The law will often dictate the specific requirements, including applicable building codes, design and/or maintenance standards, as well as any specific local amendments. Once the enforceable rules are known, the investigator must make sure they capture the necessary site information and characteristics of the incident to determine whether the location of the incident can be considered in violation of “code compliance.”

As an example, consider a person who trips on a concrete curb while transitioning from a parking lot to a sidewalk to enter a commercial establishment. The initial question is usually whether the curb in question was compliant with municipal code. In evaluating how a site does or does not comply with applicable codes, the investigator may consider (depending on the specifics of the claim):

- Reviewing photographs/videos of the incident to determine the exact curb location in question;
- Visiting the site to collect measurements of the curb, e.g., height, width, and grade, along with notation of any surface irregularities;
- Understanding the intended pathway(s) of ingress to the commercial establishment; and
- Determining coloring of the curb and surrounding surfaces (sidewalk, parking lot, etc.).

Concurrent with the collection/documentation of the above infor-

mation, the investigator will compare the observed site conditions with the applicable regulations. While this may seem to be a simple process, it is worth noting that given the specific, localized nature of a property and its governing laws, there is no one-size-fits-all approach; each incident and each jurisdiction must be considered independently to ascertain the exact site-specific requirements.

Perceptual and Behavioral Analysis of Slips, Trips, and Falls

In addition to assessing code compliance for ground-level fall claims, there is often a question as to why and how the slip/trip and fall event could have occurred. This involves assessing whether there were environmental constraints (e.g., walls, lighting, nearby objects) which could have prevented a pedestrian from accurately perceiving the conditions of the incident area (e.g., sidewalk, stairs, pavement, surface texture, etc.) with sufficient time to avoid the incident. The environmental conditions at the time of interest are then incorporated into an understanding of the mechanics of gait and locomotion, the perceptual information a pedestrian uses for successful navigation, and confounding factors that may limit a person’s ability to achieve successful navigation and/or successfully recover from a slip or trip event to prevent a fall.

The mechanics of walking is often described as a “controlled fall,” with each step employing motor control to preserve balance and counteract the effects of grav-

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Any Juror Can Be a “Nuclear” Juror

By Maithilee Pathak
R&D Strategic Services

Clients often ask us how to identify the dreaded “nuclear” juror—you know the fear: the juror who has potential to lead the jury to a “nuclear” verdict. Is the nuclear juror young or old? Male or female? Educated or not? We have seen many such verdicts in recent years. In 2021, a jury in Georgia awarded \$200 million to the family of a child killed in a boating accident. That was several years ago, and some feel that figure triggers nostalgia given recent verdicts. Another jury in Texas awarded several times that figure to the family of a grandmother who was killed by a troubled cable technician caught during the midst of a home robbery. In 2023, a jury in Georgia awarded \$1.7 billion in a products liability case against a major car manufacturer. In 2024, a jury in Philadelphia awarded \$2.3 billion to a man who developed non-Hodgkin lymphoma allegedly due to chemical exposure. These verdicts are not limited by jurisdiction, the type of case, or the industry. So, how can trial teams identify and strike the “nuclear” jurors? They can’t.

As alarming as it may sound, there is no such thing as the “nuclear” juror. Rather, any juror can become the nuclear juror, and any jury can return a nuclear verdict under certain circumstances.

What circumstances drive nuclear verdicts? First, jurors look for OSIs—other similar incidents. How many times has this happened before? Why? Jurors apportion fault for bad outcomes based on each party’s level of knowledge and control. That is, jurors consider which party had the most knowledge (i.e., information) about the circumstances precipitating the bad outcome, and



which party had the greatest control (i.e., ability to avert the bad outcome). The party that jurors perceive to be in the superior position of knowledge and control is typically apportioned the greatest fault for the bad outcome. Jurors reason that if this bad thing has happened a bunch of times before, the company was on notice it could happen, and the company could/should have done something to prevent it.

Jurors in the boating accident case determined that a design defect in the family boat allowed wake water to sweep their small child overboard and into the boat’s propeller. Over the course of the trial, jurors learned that the boat manufacturer had received reports of prior incidents of children being swept overboard. In response to those reports, the company made changes to the boat design and those changes protected purchasers of subsequent model year boats. But, the company did not recall prior model year boats.

That brings us to the second factor that drives nuclear verdicts. Namely, regulatory action against the defendant or recalls. Jurors

place great weight on citations issued by regulatory agencies and/or on recalls issued by defendant companies. Jurors in the 2021 boat case thought the company had failed to issue a recall to retrofit prior year models with some sort of safety device. Or, at minimum the company should have communicated the risk to customers of prior model years, and it failed to do so.

The third factor driving nuclear verdicts is the presence of internal documents in the company files suggesting the company engaged in a profit/loss calculation in determining whether to redesign future model year products and/or whether to recall or retrofit past model year products. In keeping with the knowledge/control analysis, jurors expect companies to inform consumers of important information about the function/use of a product. Jurors reason any failure to issue a recall or, at minimum, to communicate risks of the hazard to consumers is effectively the company denying customers critical information about the risk and therefore denying customers the op-

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

GDLA Honors Judges at 19th Reception

GDLA hosted its 19th Judicial Reception at State Bar Headquarters in Atlanta on Thursday, January 25, 2024. This annual (pandemic years aside) gathering honors judges from Georgia's appellate courts, state and superior courts, State Board of Workers' Compensation, as well as the federal bench. Almost 200 judges and members enjoyed an evening of networking.





Pictured at the 19th Judicial Reception are: 1. DeKalb State Court Judge Mike Jacobs and President Pamela Lee. 2. Cobb State Court Judge Allison Salter, Cobb Superior Court Judge Sonja Brown, Cobb Superior Court Judge LaShawnda Sampson, and Cobb State Court Judge Jaret Usher. 3. Erica Morton, Cobb State Court Judge Diana Simmons, President-Elect Bill Casey, and Kevan Dorsey. 4. Cobb State Court Judge Jane Manning, Joe Menello, and Frank Bedinger. 5. Anne Gower, Court of Appeals Judge Ben Land, Court of Appeals Judge Jeff Watkins, and Treasurer Ashley Rice. 6. Shea Maloney, Blake Walker, and Meg Daly. 7. VP Jason Logan, State Board of Workers' Comp Judge Frank McKay, and Eric Proser. 8. Philip Thompson, Supreme Court Justice Andrew Pinson, Secretary Marty Levinson, and Joe Stephens. 9. Executive Director Jennifer Davis Ward and Supreme Court Justice John Ellington. 10. Nelofar Agharahimi, Court of Appeals Judge Elizabeth Gobeil, and Lauren Culver. 11. Brad Marsh, Supreme Court Justice Carla McMillian, and Jim Hollis. 12. Michael Scaljon, DeKalb Superior Court Judge Nora Polk, and Shane Keith. 13. Mike St. Amand and Fulton Superior Court Judge Eric Dunaway. 14. DeKalb Superior Court Judge Yolanda Parker-Smith, Fulton Superior Court Judge Belinda Edwards, Rockdale State Court Judge Clarence Cuthbert, and Dallas Roper. 15. Past President Peter Muller and Fulton State Court Judge Susan Edlein. 16. Carrie Christie and Atlanta Municipal Court Judge Ardra Bey. 17. Fulton State Court Judge Wes Taylor and Mark Lefkow. 18. Court of Appeals Judge Stephen Dillard, Elissa Haynes, and Jason Willcox. 19. Paul Spann, Fulton Superior Court Judge Rachel Krause, and Robert Lusk.




GDLA Honors Judges at 19th Reception



Pictured enjoying the reception are: 1. GDLA PAC President Jake Daly, GDLA lobbyist Kade Cullefer, Jonathan Adelman, and GDLA member and Senator Bill Cowsert. 2. Cobb Superior Court Judge Julie Adams Jacobs and Bryan Dayton. 3. Zach Matthews and Fulton State Court Judge Jane Morrison. 4. Fulton Superior Court Judge Kevin Farmer and Wayne Melnick. 5. Luke Kennedy and Paschal Glavinovs.

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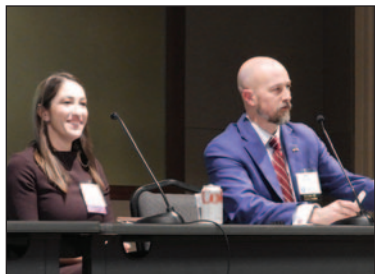
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Pictured above are Elissa Haynes and Zach Matthews. Below is Kari Williamson with J.S. Held.

On Thursday, January 24, immediately preceding the 19th Judicial Reception, GDLA members gathered for a CLE to learn trial strategies for use in cases where a plaintiff’s physician treats him/her on a lien.

Elissa Haynes of Freeman Mathis & Gary in Atlanta and Zach Matthews of McMickle Kurey & Branch in Alpharetta teamed up with Kari Williamson, BS, RN, LNCC, CCM, for the two-hour seminar. Williamson, Senior

VP with GDLA Platinum Sponsor J.S. Held, specializes in medical management and bill review.

After reviewing the lien doctor business model, the trio discussed using discovery requests and follow-up motions to get lien-based care materials, using chronologies to pinpoint lawyer-directed treatment, and using the acquired materials at trial to cross-examine on bias and to show unreasonableness of inflated medical bills. ♦





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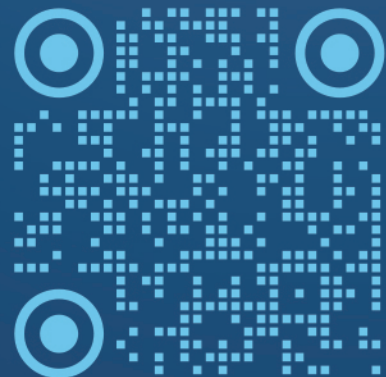
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GDLA Board Holds Winter Meeting

As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the 19th Judicial Reception, convening at State Bar Headquarters on January 25, 2024.

We were again honored to have GDLA member and DRI Past President Douglas Burrell there for a report on the state of the national defense bar and DRI's efforts in that regard.

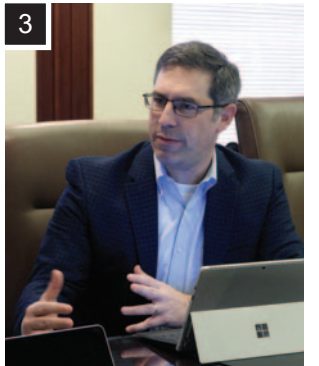
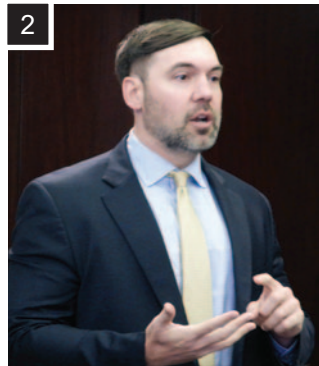
GDLA's Political Action Committee President Jake Daly reported with GDLA's lobbyist, Kade Cullefer, on our efforts under the Gold Dome. Immediately following the meeting, past presidents and officers adjourned to the Capital City Club downtown for the Seventh Past Presidents Luncheon (see page 44).

Those present were Executive Committee: President Pamela Lee, Swift Currie McGhee & Hiers, At-

lanta; President-Elect William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; Treasurer Ashley Rice, Waldon Adelman Castilla McNamara & Prout, Atlanta; Secretary Martin A. "Marty" Levinson, Hawkins Parnell & Young, Atlanta. Vice Presidents: Jason D. Logan, Constangy Brooks & Prophete, Macon; and Tracy O'Connell, Ellis Painter, Savannah. Board Members Anne D. Gower, Gower Wooten & Darneille, Atlanta; James D. "Jim" Hollis, Balch & Bingham, Atlanta; Karen K. Karabinos, Chartwell, Atlanta; Barbara Marschalk, Drew Eckl & Farnham, Atlanta; Zach Matthews, McMickle Kurey & Branch, Alpharetta; Erica Morton, Swift Currie McGhee & Hiers, Atlanta; Dallas Roper, James Bates, Macon; Joseph D. Stephens, Cowser Heath, Athens; Philip Thompson, Ellis Painter, Savannah; Mary Elizabeth "Libby" Wat-

kins, Levy Sibley Foreman & Speir, Augusta; C. Jason Willcox, Moore Clarke DuVall & Rodgers, Albany. Past Presidents Walter B. McClelland, Freeman Mathis & Gary, Atlanta; Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; N. Staten Bitting, Jr., Levy Sibley Foreman & Speir, Augusta; Peter D. Muller, Goodman McGuffey, Savannah; and William G. "Bill" Scrantom, Jr., Page Scrantom et al., Columbus (retired). Also present were PAC President Jacob "Jake" Daly, Freeman Mathis & Gary, Atlanta; GDLA lobbyist Kade Cullefer. Troutman Pepper Strategies, Atlanta; Young Lawyers Chair Leah Fox Parker, Swift Currie McGhee & Hiers, Atlanta; DRI Past President Douglas Burrell, Chartwell, Atlanta; DRI State Representative Robert Luskin, Chartwell, Atlanta; and Executive Director Jennifer Davis Ward. ♦

Pictured at the Board's Winter Meeting are: 1. Anne Gower and Treasurer Ashley Rice. 2. GDLA lobbyist Kade Cullefer. 3. DRI State Rep Robert Luskin. 4. Amicus Co-Chair Philip Thompson. 5. President-Elect Bill Casey and Joe Stephens. 6. DRI Past President and GDLA member Douglas Burrell. 7. Secretary Marty Levinson.



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Amber Bishop is an ACTAR accredited Traffic Accident Reconstructionist (ACTAR #3780) and

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

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GDLA Honors Former Leaders at Seventh Past Presidents Luncheon

GDLA honored those who have contributed so much of their time to shaping the civil defense bar during the Seventh GDLA Past Presidents Luncheon on January 26, 2024, at the Capital City Club downtown.

The first such 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.

While a cause for celebration, the luncheon was also a somber occasion as the group remembered Past President Patrick J. “Pat” Rice, who passed away on January 4,

2024. He led the organization from 1989-1990. We later bid farewell to Wilbur Brooks who passed away a few days after the luncheon on January 29. He succeeded Pat Rice as GDLA President, serving from 1990-1991. See page 16 for a memorial tribute to both. ♦



Front row (left to right): W. Melvin “Mel” Haas III, 2011-2012, Constangy Brooks Smith & Prophete, Macon; Eugene P. “Bo” Chambers, Jr., 1981-1982, now with Chambers & Aholt, Decatur; William G. “Bill” Scrantom, Jr., 1972-1973, Page Scrantom Sprouse Tucker & Ford, Columbus (retired); George E. Duncan, Jr., 1999-2000, Dennis Corry Smith & Dixon, Atlanta; and Theodore “Ted” Freeman, 2013-2014, Freeman Mathis & Gary, Atlanta (retired). **Back row:** Hall F. McKinley III, 2018-2019, Drew Eckl & Farnham, Atlanta; N. Staten Bitting, Jr., 2009-2010, Levy Sibley Foreman & Speir, Augusta; Albert H. “Al” Parnell, 1979-1980, Hawkins Parnell & Young (retired), Atlanta; Peter D. Muller, 2016-2017, Goodman McGuffey, Savannah; Grant B. Smith, 2004-2005, Dennis Corry Smith & Dixon, Atlanta; Walter B. McClelland, 2001-2002, formerly Mabry & McClelland and now Freeman Mathis & Gary, Atlanta; and current President Pamela Lee, Swift Currie McGhee & Hiers, Atlanta.

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Southeast Women Litigators Hold Third Conference

Women litigators in Alabama, Georgia, Florida, North Carolina, South Carolina, and Tennessee teamed up to support, educate and advance women civil defense litigators at the Third Southeastern Women Litigators (SEWL) Conference held February 29 to March 1, 2024, at The Hutton in Nashville, Tenn.

Attendees and presenters had a lot of fun with this year’s theme, which centered on a quote by Dolly Parton: “Find out who you are, and do it on purpose.”

The conference kicked off on Thursday at noon with a networking luncheon followed by programming the rest of the day. Attendees gathered that evening for cocktails, mocktails, and fellowship before dispersing to dine-around dinners.

Friday’s programming lasted until noon with the last session fea-

turing a conversation with Judge Frank G. Clement, Jr. He was a trial court judge for eight years before moving to the Court of Appeals of Tennessee in 2003, where he presently serves as the presiding judge of the Middle Section of the Court. GDLA VP Beth Boone of Hall Booth Smith in Brunswick clerked for Judge Clement early in her career; she moderated a discussion where he shared insights from his experiences working with women in the courtroom. Karen Karabinos of Chartwell Law in Atlanta and Ashley Rice of Waldon Adelman in Atlanta teamed up to present on building a book of business.

Karabinos created the SEWL conference concept after also initiating, and chairing for the first two years, a Women Litigators Section within GDLA. Her impetus behind SEWL was to give female civil de-

fense lawyers in the southeast the opportunity to experience what DRI offers annually at its women’s conference in Arizona. The goal being those who could not otherwise afford to attend that amazing event—whether for financial reasons or the extra time required out of the office to travel out West—could enjoy the same networking and learning experience just a short drive or flight away from their hometowns.

The planning committee consisted of two representatives from each state’s defense organization, as well as the respective Executive Directors. The six participating states are shown below. We are grateful to this year’s law firm sponsors, also shown below by level, who helped offset expenses. The 2025 conference will likely be in Florida. ♦

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Pictured at SEWL: 1. Beth Brooks, Laney Ivey, Peyton Burkett, Sophia Karnegis, and Bea Hancock. 2. SEWL creator Karen Karabinos and GDLA Treasurer Ashley Rice discuss rainmaking. 3. Jennifer Nutter (SC), Karen Karabinos, Marie Lang (NC), and Kitty Boyte (TN). 4. Donna Davis and Ashley Rice. 5. Danielle Glover, Candace Rodgers, Janine McKinnon, and Candis Jones Smith. 6. Dawn Carson (TN), Stacy Moon (AL), and Sarah Wetmore-Butler (SC), channeling their inner Dolly, tumbled outta bed and stumbled to the kitchen to offer tips for a deposition. 7. Amanda Morris, Lauren Schultz, and Katelyn Barham (TN). 8. Jennifer Harrison (TN) and Beth Boone. 9. Sheetal Brahmhbhatt, Amanda Coop (TN), Ashley Howard, and GDLA President Pamela Lee. 10. Tennessee Court of Appeals Judge Frank Clement poses with SEWL attendees. Beth Boone (standing on his right), who clerked for him out of law school, moderated his session.

GDLA Board Holds Spring Meeting

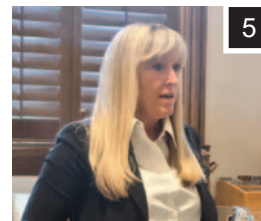
The GDLA Board of Directors convened at the Ritz-Carlton Lake Oconee from March 22-24, 2024.

The Board's Spring Meeting weekend commenced with a reception in the hospitality cottage after which Mother Nature forced us indoors for our group dinner. The Board meeting took place Saturday morning, leaving the afternoon free for everyone to enjoy watching March Madness, golfing, biking, and more. Board members and their spouses and guests gathered again in the hospitality cottage on Saturday evening for a reception before dispersing to dinner on their own.

Those present were President Pamela Lee, Swift Currie McGhee & Hiers, Atlanta; President-Elect William T. "Bill" Casey, Jr., Swift

Currie, Atlanta; Treasurer Ashley Rice, Waldon Adelman Castilla McNamara & Prout, Atlanta; and Secretary Martin A. "Marty" Levinson, Hawkins Parnell & Young, Atlanta. Vice Presidents: Beth Boone, Hall Booth Smith, Brunswick; and Tracy O'Connell, Ellis Painter, Savannah. Board Members: Anne Gower, Gower Wooten & Darneille, Atlanta; Karen Karabinos, Chartwell Law, Atlanta; Scott Kelly, Fulcher Hagler, Augusta; Barbara Marschalk, Drew Eckl & Farnham, Atlanta; Zach Matthews, McMickle Kurey & Branch, Alpharetta; Erica Morton, Swift Currie, Atlanta; Joseph D. "Joe" Stephens of Cowser Heath, Athens; Mary Elizabeth

"Libby" Watkins, Levy Sibley Foreman & Speir, Augusta. Past Presidents: N. Staten Bitting, Jr., Levy Sibley Foreman & Speir, Augusta; Walter B. McClelland, Freeman Mathis & Gary, Atlanta; Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; Peter D. Muller, Goodman McGuffey, Savannah, and David N. Nelson, Chambliss Higdon, Macon. Also present: GDLA PAC President Jacob "Jake" Daly, Freeman Mathis & Gary, Atlanta; GDLA's lobbyist Kade Cullefer, Troutman Pepper Strategies, Atlanta; Young Lawyer Section Chair Leah Fox Parker, Swift Currie, Atlanta; and Executive Director Jennifer Davis Ward. ♦





Pictured at the Board's Spring Meeting are: 1. Tracy O'Connell, Libby Watkins, President Pamela Lee, and Treasurer Ashley Rice. 2. Chris and Karen Karabinos with Cindy and Past President Staten Bitting. 3. Erica Morton and her daughter, Caitlin. 4. GDLA lobbyist Kade Cullefer, Past President Dave Nelson, GDLA PAC President Jake Daly, and Past President Matt Moffett. 5. Barbara Marschalk. 6. Young Lawyers Chair Leah Parker. 7. Margaret Hall (second from left) was our special guest as former GDLA First Lady and wife of the late Past President George Hall. She is with (l-r) Debbie and Past President Bubba Hughes, and Past President Walter McClelland and his wife, Kathy. 9. Anne Gower and President-Elect Bill Casey. 9. Joe and Christina Stephens with Patty Kilgore and Past President Hall McKinley. 10. Scott Kelly.

Redfearn Amicus Brief

Continued from page 20

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

is a binding settlement agreement, even if the demand letter included additional terms.

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

to the parties in the ongoing litigation.

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

As this magazine went to press, the Court of Appeals was set to hear oral arguments on May 1, 2024.

GDLA thanks members David Atkinson and Sarah Daley of Swift Currie McGhee & Hiers, Atlanta, who co-authored the brief. ♦

President's Message

Continued from page 5

we need to get organized now. That requires funding, so please consider having your law firm contribute to this good cause. Checks can be made payable to "GDLA Action Fund, Inc." and mailed to the GDLA address (P.O. Box 67, Rossville, GA 30741). Please also consider including the \$25.00 voluntary donation you will see on your dues notice in May.

It is critically important that GDLA continues to build on its lobbying success, and we need your financial support to do that. Thank you for your consideration.

For the defense,



Pamela N. Lee
Swift Currie McGhee & Hiers
Atlanta

GDLA Political Action Committee (PAC) Donors

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

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Psychiatrist's Duties

Continued from page 22

will be excluded from evidence.¹² Communications include not only discussions during therapy sessions, but also all 'disclosures made in confidence[,]'" including all communications and admissions between the patient and the psychiatrist.¹³ Thus, privilege in Georgia protects the contents of psychiatric health records from being disclosed to anyone but the patient, except under limited circumstances.¹⁴

Confidential communication will not only be inadmissible evidence at trial, but also undiscoverable. The scope of discovery in Georgia is very broad, but it is not without limits.¹⁵ Indeed, discovery is limited by evidentiary privileges, including the psychiatrist-patient privilege,¹⁶ and records kept by a psychiatrist will be granted special protections.¹⁷ Any "communications and admissions" between a patient and his or her mental-health professional well as any information that the professional holds which has its origins in those communications will be privileged and is therefore, not discoverable material.¹⁸

Privilege, however, does not extend to all communications, as "treatment or contemplation thereof is a prerequisite to the existence of the professional relationship necessary for the privilege."¹⁹ For example, privilege does not cover communications between patients and nurses or office attendants, unless they are acting as agents of the psychiatrist.²⁰ Further, records that disclose information shared between the psychiatrist and others who are not mental health professionals may be discoverable.²¹ Finally, the fact that a person was employed or treated by a health care provider will not be protected by privilege.²²

III. Psychiatrist's Duty to Warn or Protect

A mental health professional's duty to warn was first discussed in 1976 in *Tarasoff v. Regents of the University of California*.²³ In this case, which has been cited over one thousand times, the California Supreme Court found that a special relationship between a patient and his or her therapist may give rise to an affirmative duty for the therapist to warn or protect.²⁴ The court stated that a therapist need not "render a perfect performance[,]," however:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances...While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances.²⁵

Georgia is one of the few states that does not recognize the common law duty to warn outlined in

Tarasoff. Instead, the courts have adopted the position that "a doctor, like any actor, generally has no duty to exercise control over third persons to prevent them from harming others."²⁶ There are only two exceptions to this rule: (1) the mental health professional has

In *Bradley Center v. Wessner*, the Georgia Supreme court found when a mental health professional has control over a patient and the professional knows or should have known "that the patient is likely to cause bodily harm to others, an independent duty arises from that relationship and falls upon the [professional] to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient."²⁸ The patient in *Bradley Center*, was undergoing treatment at a private mental hospital and confided in hospital staff that he intended to physically harm his wife if he was given the opportunity.²⁹ Though the patient had been voluntarily committed, he had agreed to certain restrictions, including the hospital's authority to detain him for up to 48 hours in the event he sought discharge against medical advice.³⁰ On an unrestricted weekend leave from the facility, the patient shot and killed his wife.³¹ The Court recognized that the hospital in *Bradley Center* had control over the patient, knew he was a danger to others, and breached its "duty to exercise reasonable care to control over the [patient] to prevent him from doing such harm."³²

Control necessary to effectuate this exception, only arises when the mental health professional has legal authority to restrain the liberty interests of his patients.³³ In *Bradley Center*, the hospital had a legal right to detain the patient, and thus, the court deemed it to have the required control. However, Georgia courts have been reticent to confer that duty on mental



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health professionals treating outpatients, particularly where the treating physicians had no authority to confine or restrain the patient.³⁴

Second, where there is a special relationship between the healthcare professional and the injured party, the physician may have a duty to protect. This exception to the general rule is very narrow, and Georgia courts have consistently refused to expand a physician's duty to his patient to include members of the public at large.³⁵ Were courts "to impose a duty on a physician to consider the risk of harm to third persons . . . [they] would be forcing the physician to weigh the welfare of unknown persons against the welfare of his patient. Such an imposition is unacceptable."³⁶ Instead, a "special relationship" only exists between government entities for the acts public safety agents and members of the public.³⁷

IV. Involuntary Admission

A delicate balance exists between protecting individual's liberty interests and involuntary hospitalization when it is medically necessary. The four stages of the involuntary admission process, discussed below in detail, are: (1) the initial examination; (2) admittance to the receiving facility; (3) transfer to the evaluation facility; and (4) involuntary commitment.³⁸

A. The Initial Examination

In order to execute a 1013 certificate,³⁹ a patient must be personally examined by a mental health professional. Then, the patient must meet the criteria for involuntary commitment, before the professional may act.⁴⁰ First, the patient must be mentally ill. Also, the patient must either present "a substantial risk of imminent harm to . . . others, as manifested by either recent overt acts or recent expressed threats of violence" or "is so

unable to care for that person's own physical health and safety as to create an imminently life-endangering crisis[.]"⁴¹

The examiner has 48 hours from the time of the examination to sign the 1013 certificate and cite his or her findings.⁴² Effectively, the certificate serves as a notice, allowing a peace officer to take the patient into custody for involuntary treatment.⁴³ The mental health pro-

— “ —

Confidential communication will not only be inadmissible evidence at trial, but also undiscoverable.

— ” —

fessional's certificate will be valid for seven days from the date of issuance. Within 72 hours of receiving the 1013 certificate, a peace officer must make a diligent effort to find the patient named and immediately take him to the nearest available emergency receiving facility in the county where the patient is discovered."⁴⁴

B. Admittance to the Receiving Facility

Once the patient is discovered and admitted to the emergency receiving facility, he must be examined within 48 hours.⁴⁵ Unless the examining physician or psychologist concludes the patient is mentally-ill, the patient must be discharged.⁴⁶ In the alternative, if the examiner finds that the patient is mentally unstable, he or she must execute a 1014 certificate to continue holding the patient at the facility.⁴⁷

C. Transfer to the Evaluating Facility

After the physician or psychiatrist has executed and signed the 1014 certificate, the patient may be transferred within 24 hours to an evaluating facility.⁴⁸ At the evaluating facility, the patient will be admitted and received for another evaluation and for the necessary treatment.⁴⁹ However, if outpatient treatment is deemed appropriate, the patient then must be discharged within four hours of being examined by a psychologist, with concurrence by a physician.⁵⁰ A patient suitable for outpatient treatment, is still considered "mentally ill;" however, because of his or her mental history or status, a patient may be better suited for treatment outside of a hospital facility.⁵¹

D. Involuntary Admission

Finally, after the evaluation of the patient the chief medical officer may determine that involuntary treatment is necessary.⁵² The chief medical officer will help develop an individualized plan for the patient, and subsequently execute a certificate, supported by two other physicians or in the alternative a physician and a psychiatrist, which recommends continued detention.⁵³ This certificate must be filed with the court, which will hold a hearing within seven to twelve days after the petition is filed. The court may then authorize hospitalization for up to six months.⁵⁴

E. Possible Ramifications

A psychiatrist may not impose involuntary treatment on a patient unless it is under extraordinary circumstances.⁵⁵ Further, any patient who objects to a treatment plan has a right to his own physical integrity and may request a protective order from a judge.⁵⁶ False imprisonment is another claim that may be brought against a psychiatrist who involuntarily admits a patient.

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However, the Court of Appeals in *Williams v. Smith*, has made it increasingly difficult for patients to prove false imprisonment claims.⁵⁷ In *Williams*, a psychiatrist determined that his patient required involuntary treatment. He asked her not to leave the treatment facility so that he could admit her for hospitalization. Despite his requests, the patient left the facility and returned to work, so the psychiatrist executed the appropriate 1013 certificate, which was effectuated later that day. Upon examination at the emergency receiving facility, the treating physician determined that the patient did not require involuntary treatment and released her. The patient subsequently filed a false imprisonment claim against the psychiatrist who issued the 1013 certificate.⁵⁸

The Court of Appeals determined that physicians can rely on their own personal observations, as well as the testimony of behavior observed by others, when determining whether a patient should be involuntarily committed.⁵⁹ Simply because two psychiatrists disagree as to a patient's need for involuntary admittance does not evidence negligence.⁶⁰ Furthermore, when a person is taken into custody pursuant to a validly executed 1013 certificate, the resulting detention is not unlawful and will not give rise to a false imprisonment cause of action.⁶¹ However, when a patient is held in custody pursuant to a defective or void 1013 certificate, a viable claim exists, particularly if the certificate was not issued in good faith.⁶²

V. Conclusion

The Georgia courts and legislature have recognized the important role that mental health providers play, as evidenced by the almost absolute privilege barring the discovery of communication between a patient and her psychiatrist.

Though the law regarding a psychiatrist's duty to third parties is still evolving, one thing is clear, a mental health professional's first loyalty should always be to his patient. Thus, when trying to protect a patient or the public, a mental health professional has the legal tools to voluntarily or involuntarily treat his patients. ♦

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² *Wiles v. Wiles*, 264 Ga. 594, 595 (Ga. 1994).
³ *Id.*
⁴ O.C.G.A. § 24-12-1(a).
⁵ *Trammel v. Bradberry*, 256 Ga. App. 412 (2002).
⁶ *Cooksey v. Landry*, 295 Ga. 430, 433 (2014) (“The strength of the psychiatrist-patient privilege is further evident in that the privilege is held only by the patient and waiver of the privilege must be expressly made by the patient”).
⁷ See *Cooksey*, 295 Ga. at 435; O.C.G.A. § 31-33-4 (expressly providing that a deceased patient's representative cannot waive the psychiatrist-patient privilege).
⁸ *Id.* at 436.
⁹ *Id.* (“[T]o allow a trial court, through the exercise of its equitable powers and its own notion of what is right, to require disclosure of privileged communications would bring uncertainty to Georgia's well-defined psychiatrist-patient privilege and eviscerate its effectiveness.”).
¹⁰ *Id.* at 435-36 (stating public policy in Georgia “necessitated [the] enactment of a nearly absolute [mental health] privilege, one without exception if the patient is deceased or the nature of the patient's mental condition is put at issue”).
¹¹ “*Sletto v. Hosp. Auth.*, 239 Ga. App. 203, 205-06 (Ga. Ct. App. 1999).
¹² O.C.G.A. § 24-5-501; *Cornelius v. Hutto*, 252 Ga. App. 879, 883 (Ga. Ct. App. 2001).
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¹⁴ *Kennestone Hosp. v. Hopson*, 273 Ga. 145, 147 (Ga. 2000) (“As a matter of public policy,

this state has long provided for the confidentiality of communications between psychiatrist and patient.”).
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¹⁹ *State v. Herendeen*, 279 Ga. 323, 326 (2005).
²⁰ *Brown v. Howard*, 334 Ga. App. 182, 186-87 (2015).
²¹ *Id.*
²² *Id.* See *Cranford v. Cranford*, 120 Ga. App. 470, 472 (1969) (affirming order compelling disclosure of a psychologist's deposit stubs and daily appointment books).
²³ 17 Cal.3d 425 (1976).
²⁴ *Id.* at 345.
²⁵ *Id.* at 345-346.
²⁶ *Gilhuly v. Dockery*, 273 Ga. App. 418, 419 (2005).
²⁷ *Bruscato v. Gwinnett-Rockdale-Newton Cmty. Serv. Bd.*, 290 Ga. App. 638, 640 (2008).
²⁸ 250 Ga. 199, 200 (1982).
²⁹ *Id.* at 199.
³⁰ *Id.*
³¹ *Id.*
³² *Id.* at 201-02.
³³ *Houston v. Bedgood*, 263 Ga. App. 139, 142 (2003).
³⁴ See *Ermutlu v. McCorkle*, 203 Ga. App. 335, 337 (1992); *Baldwin v. Hosp. Auth. of Fulton Co.*, 191 Ga. App. 787, 789 (1989).
³⁵ *Shortnacy v. N. Atlanta Internal Med.*, 252 Ga. App. 321, 327 (2001).
³⁶ *Id.*
³⁷ *Id.* at 326 (citing *Huntington v. City of Atlanta*, 241 Ga. App. 608, 610 (1997)).
³⁸ O.C.G.A. §§ 37-3-40 et seq.
³⁹ Form 1013 is distributed by the Georgia Department of Behavioral Health & Developmental Disabilities and is also known as the “Certificate Authorizing Transport to Emergency Receiving Facility & Report of Transportation.”
⁴⁰ See *Ermutlu*, 203 Ga. App. at 337.
⁴¹ O.C.G.A. § 37-3-1(9.1).
⁴² O.C.G.A. § 37-3-41(a). This version of the statute is effective until June 30, 2018. However, the substance of the process will not be changed. Instead the legislature has changed some of the terminology.
⁴³ *Id.*
⁴⁴ *Id.* at § 37-3-41(b).
⁴⁵ *Id.* at § 37-3-43(a).
⁴⁶ *Id.* (or unless “the patient is under criminal charges, notice of which has been given in writing to the facility”).
⁴⁷ *Id.*
⁴⁸ *Id.* § 37-3-43(b).
⁴⁹ *Id.* § 37-3-41(b).
⁵⁰ *Id.* §§ 37-3-91(a)-(b).
⁵¹ See *Id.* §§ 37-3-1(12.1)-(12.2).
⁵² *Id.* § 37-3-81.
⁵³ *Id.* § 37-3-81.
⁵⁴ *Id.* § 37-3-81.
⁵⁵ *Ermutlu*, 203 Ga. App. at 337.
⁵⁶ O.C.G.A. § 37-3-163(c).
⁵⁷ 179 Ga. App. 712 (1986).
⁵⁸ *Id.* at 715-16.
⁵⁹ *Id.* at 716-717.
⁶⁰ *Id.*
⁶¹ *Id.*
⁶² *Id.*



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Medical Damages

Continued from page 26

note that knowing a provider's usual rates does not provide any information regarding the *reasonable value* of the rate, for all the reasons described above. In fact, the provider often receives *lower* amounts in full satisfaction of the charges, simply because nobody pays more than a billed amount.

Customary. The term “customary” gets at whether the provider's rates are aligned with other providers in the geographic area performing the same service. For professional services, all medical services are grouped into Current Procedural Terminology (“CPT”) codes. If we look within a geographic area for providers performing the same CPT, it is very likely that it will be a very similar type of provider. Thus, assessing the average rates charged for the same CPT is a methodologically sound means of “peer reviewing” charged rates; that is, to determine whether peers are charging similar amounts. This is a very important part of whether a fee is considered reasonable.

Reasonable. The term “reasonable value” is akin to the economic term “fair market value,” and refers to whether a price is considered reasonable for a product or service. Reasonableness can be ascertained two different ways. One way is to simply judge whether the price makes sense. A regular cup of coffee priced at \$1,000 is probably not a price based on reasonable value. But a more methodologically sound means of accomplishing the same task is to base our assessment of value on the *usual transacted amount* of the product or services, which reflects consumers’ “willingness to pay.” If a coffee shop has not sold a single regular cup of coffee for \$1,000, economists would not

ever say that the fair market value of the coffee is the \$1,000 charged amount. Instead, they would look to see what prices are being paid (i.e., the transacted amounts) for similar cups of coffee, whereupon the economist would conclude that the fair market value of the cup of coffee is maybe \$3, not \$1,000. Healthcare is of course more complex than coffee, but the same basic principles hold true.

Solutions. The UCR standard is used by a variety of entities to determine the fair market value of medical services. Similarly, health researchers and health economists use UCR to determine the actual value of services. For example, health economists often calculate the medical cost “offsets” associated with new drugs and devices; that is, the value of the services saved if the new drug or device were to be used. In conducting these kinds of studies, the use of charge data is inappropriate because it does not reflect reasonable value.¹⁴ Consequently, health economists over the years have developed tools to adjust billing and charge data to reflect fair and reasonable value.¹⁵ These tools are commonly used in the fields of health economics, health services research, economics, and business. The same tools can be applied to past medical expenses and estimated future medical expenses to determine the fair and reasonable value in personal injury, product liability, and malpractice cases. In the case of LCPs, applying a reasonable value amount can have a substantial impact on medical damages, because the reasonable value amount is propagated across many years. The same conceptual approach can also be applied to wage-related losses and other types of losses, such as alleged hedonic damages. ♦

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Reconstructing Reality

Continued from page 28

in it. Whether through a head-mounted display or on a computer screen, you're transported to the heart of the incident, able to view the scene from multiple angles, including the perspectives of involved parties. This virtual environment lets you assess the feasibility of witness statements, for example, examining potential obstructions to an eyewitness's point of view.

Videogrammetry is used to align video within a 3D scene model and enables precise movement recreation. Software like HVE and PC Crash simulate ground vehicle motion and radar and GPS data are useful for aviation accidents. Video and simulation data ensure that by the time we reach trial, the animations presented are founded on accurate and verifiable data.

Critical data analysis is important for developing strong visuals and aligning your legal team. Thorough data collection significantly streamlines this process while taking shortcuts may lead to increased costs and delays. It's important to secure relevant evidence early that will withstand judicial scrutiny and effectively support your case.

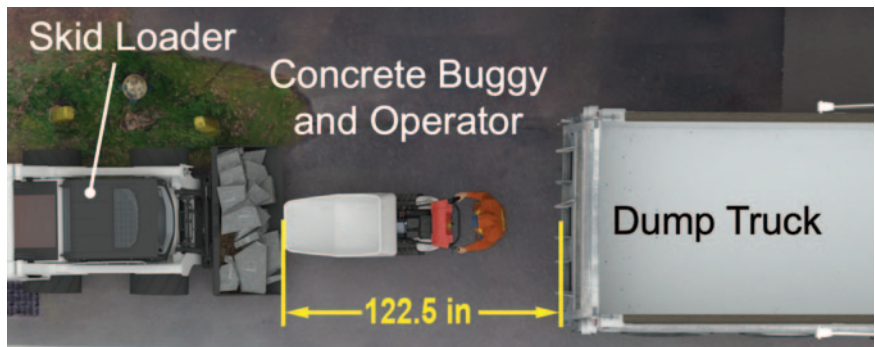


Figure 1: Scene reconstructed from scan and photos.

Case Overview: Landscaping Incident

A critical workplace injury occurred at a landscaping site. The individual sustained injuries after being crushed between a motorized concrete transport buggy and a dump truck's tailgate (Figure 1). The landscaper was engaged in the transfer of concrete debris using a skid loader that was stationed on the side of a roadway to load the demolished concrete into a dump truck. During the operational cycle, the buggy operator reversed the concrete buggy away from the loader and into the back of the dump truck, resulting in his upper torso pressing against the vehicle's tailgate. He was trapped in a position that caused his chest to press



Figure 2: Accident photo of skid loader.

the safety lever that, when released, stopped the drive system on the buggy.

The reconstruction of the event was informed by two photographs secured by first responders, which became the crux of the spatial analysis (Figure 2). Because the laser scan was taken long after the accident, placing the scale vehicle models accurately within the scene was a challenge. Advanced laser

scanning techniques and 3D models of the skid loader, truck, and buggy, augmented by the injured worker's biometric profile, were utilized to reconstruct the scene. The precise positioning of the skid loader and dump truck, critical to understanding the dynamics of the accident, was extrapolated from the photographs, defining the operational environment that was unsuitably confined.

The 3D model also served as a blueprint for a physical model (Figure 3). This model was instrumental in physical testing to challenge the alleged failure of the buggy's safety mechanism. The tests illustrated the continuous engagement of the drive system when controlled force was applied using a physical surrogate, mimicking the incident conditions.

Case Overview: Urban Transit Incident Analysis

Video camera footage can be informative. Knowing the movements of vehicles, pedestrians, and other objects may explain why an accident occurred. However, it's frequently not a good tool for determining visibility in nighttime conditions. Video cameras "see" differently in the dark than the human eye can. When a city bus struck and killed a pedestrian, a



Figure 3: 3D Reconstruction and Physical Surrogate Testing

nighttime conspicuity analysis proved crucial to understanding the bus driver's view.

The initial step in the reconstruction process involved capturing detailed survey quality data of the accident location using laser scanning to develop a precise 3D model. Concurrently, a detailed lighting analysis was executed, measuring luminosity from multiple sources which were then integrated into the 3D environmental model. This integration was critical in replicating the visual conditions during the incident and included stationary lights, like streetlights, and moving lights on vehicles (Figure 4).

Security camera footage from the bus supplied vital information regarding vehicle movements and pedestrian activity at the time of the accident. A visualization specialist utilized this data to accurately position light sources and animate the scene, enhancing the fidelity of the reconstruction.

Because the bus had a camera viewing the driver, a human factors expert's analysis contributed to the creation of a simulated driver's viewpoint. This virtual driver's vantage point was critical in showing the driver's potential visual perception during the incident (Figure 5 on next page), helping the expert explain why the pedestrian was difficult to see in the background of the headlight glare from oncoming vehicles.

Phase 3: Decision Making

The integration of rapid data collection technologies into legal practice has revolutionized how digital environments are constructed and utilized. These digital sandboxes serve as dynamic tools where layers of information about an event are assembled in valuable ways. Sandboxes allow for the iteration of scenarios, advancing the investigative process by prompting discovery questions. What other useful data exists or could be col-

Figure 4: Laser Scan and 3D Renderings from City Bus Accident





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Figure 5: Driver's View Analysis from City Bus Reconstruction

lected? What should be asked in a deposition? Things learned in the sandbox also guide physical testing to eliminate uncertainties, such as the effect of sunlight on a dirty windshield's transparency.

Once the team has exhaustively analyzed and combined all available information, the reconstructed digital model becomes an educational platform. It translates complex scenarios into visual narratives—images and movies—that animate the event for those outside the investigative circle. These visual aids are instrumental in resolving cases, with the reconstructed reality playing an important role from early in the investigation until the dispute is resolved.

Digital sandboxes play a critical role in helping clients understand and evaluate evidence, which in turn informs their decision-making. These tools allow stakeholders, who may not be well-versed in legal details to better grasp the case strategy and determine the right course of action regarding settlements or trial proceedings.

Deciding to Go to Trial

If the case does not settle and the parties move forward to trial, visual storytelling can significantly

enhance juror comprehension of complex information, tapping into the innate human proficiency for processing visual data. It can demystify expert testimony, replacing jargon with clear, impactful imagery. It's important to remember that jurors will filter the story through their personal experiences, which can both aid in understanding familiar concepts and elicit skepticism towards information that conflicts with their beliefs. Furthermore, a coherent narrative is key; jurors will scrutinize any omissions or inconsistencies with a critical eye, as evidenced by the research of Pennington and Hastie (1992).¹ Therefore, visual aids are most compelling when they are part of a well-orchestrated narrative, enhancing and reinforcing expert testimony, especially when prepared in a digital sandbox.

For attorneys incorporating visual aids alongside expert testimonies, a comprehensive understanding of the trial environment is essential. Crafting a strategy that dovetails with the courtroom's technical capabilities is the responsibility of the attorney who brings the expert witness. Legal teams must address several key logistical questions:

- What technology is available at the trial location?
- Can you conduct a preliminary test of this technology to preempt trial hiccups?
- Does the courtroom offer internet connectivity?
- What contingency plans are in place for unforeseen technical glitches?
- What is the judge's stance on the use of technology during proceedings?

Finally, make sure to consider the merits and drawbacks of advanced versus basic technological approaches (for example, equipping jurors with VR headsets versus displaying a video or live feed of the expert's VR demonstration on a screen).

Involving your visual expert early and developing themes in a digital sandbox environment can enhance the quality of visuals your team decides to bring to the courtroom. Such proactive collaboration ensures that the presentation is well-founded and informative, enabling the legal team and sponsoring expert to effectively use the visual products to communicate with the jury. ♦

Charles A. Fox, Ph.D., Senior Director of Technology Services at ESI, a GDLA Platinum Sponsor. Fox's passion for visualization is the thread that unites his diverse career. As a student and later a postdoctoral fellow, imaging the intricate patterns of neurotransmitters and receptors in brain circuitry captivated him. Consulting in patent litigation, he collaborated with chemists to produce the first 3D animations of Taq Polymerase, the enzyme that synthesizes DNA in the PCR reaction. Today, Fox leads a team of technologists who work across scientific and engineering domains, merging data capture technologies with visualization tools.

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Mediation Myths

Continued from page 30

Myth 3: All Mediators Are the Same

Mediators generally go through a similar training process; however, each person brings to the professional the benefit of their experiences prior to becoming a mediator and outside of their mediation practice. A judge or former judge may be beneficial for a variety of reasons, while an active attorney from a reputable law firm may be preferable for another. It is important to match the dispute at hand with the experience and skills of the mediator. We recognize that not every person is the right juror to hear a case, and the same is true for mediators. Mediators have subject matter expertise just like attorneys do.

Beyond the expertise, it is also important to consider the style of mediator that will work best for any given dispute. Some parties really need to have an evaluative process and will ask that the mediator provide input on the issues raised. Others will respond best to a truly facilitative mediator, but in either case, the mediator must do more than simply pass numbers back and forth.

Myth 4: Mediation Does Not Require Preparation

This is probably the most common mediation myth and a dangerous one at that. Mediation can be hard work—both for the mediator and the parties. Because mediation is most successful when information and goals for resolution are openly shared, it is important for the mediator to be educated about the facts of the case and the issues in dispute. Counsel is integral to this process because the attorney generally knows the case better than anyone. A good mediation statement takes time. It should provide the necessary information without being too adversarial.

Decisions about whether and how to make a presentation at the opening session need to be considered well in advance, with the understanding that the presentation will be very different from an opening statement at trial.

On the flip side, the mediator needs to take the time to digest material that is provided ahead of time, often reviewing actual pleadings filed in the case and even testimony or other evidence that may be offered at trial in order to gain an appreciation for the sticking points in the process.

Perhaps most importantly, the parties need to be prepared for the process. It is important that they understand the purpose of the mediation, the format for the proceeding, and the rules. The discussion of what an acceptable resolution looks like should not happen for the first time during the mediation.

Myth 5: Mediation Always Leads to Compromise

A common belief is that mediation necessitates compromising or giving up one's position entirely. In reality, mediation focuses on finding common ground and mutually beneficial solutions. It's about exploring options that address each party's interests, not just compromising positions.

There are several goals for mediation, including but not limited to reaching a settlement. Even if the case is not resolved at mediation, the process is beneficial in other ways. It can narrow the dispute, allow the parties to identify which issues remain, and potentially facilitate later efforts to resolve the case.

In some instances, the process may merely affirm that the parties' respective positions are so different and their views on value so far apart that the case is not going to settle - so that energy can then be placed on effective trial preparation.

Myth 6: Mediation is Time-Consuming and Ineffective

Some believe that mediation takes too long and rarely produces satisfactory outcomes. However, compared to litigation, mediation tends to be much quicker and much more cost-effective. Others might be concerned that mediation will prolong the process or delay a case getting to trial. It need not. If it is an adjunct to litigation, it may make a trial unnecessary, but it will not be a barrier to trial should one be necessary. A mediation conducted prior to litigation, when successful, will avoid the need for litigation outright. While not all mediations lead to an agreement, when an agreement is reached, it happens only when all parties are satisfied that the result is right for them.

Myth 7: Offering to Mediate Shows Weakness in Your Case

Some litigants might see mediation as a sign of vulnerability or a compromise of their legal position, fearing it might weaken their case. But, as noted, there are many reasons for mediating a case. One reason is a desire not to go to court, but that need not be and probably should not be shared. The parties may both desire to resolve the case short of trial, but their efforts to negotiate directly have nevertheless not been successful. All negotiations are not equal. Where direct negotiation often involves a lot of posturing on both sides, at mediation, the facilitator helps the parties view their positions in a less adversarial manner. The goal is to bring the parties together, not to achieve a win by either side.

Some believe that mediation is a weaker form of conflict resolution compared to litigation because it doesn't involve a formal judgment and is not legally binding. However, mediation often results in more satisfactory outcomes for all

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parties involved for the very reason that it is not a decision made by others. It allows for a resolution that contemplates preserving relationships and allows for more creative solutions. “Mediation seeks a mutually acceptable result, regardless of each party’s preference for something else.” Litigants might be reluctant to participate in mediation for several reasons, including a lack of understanding of what mediation entails or how it can benefit them in resolving the dispute. Certainly, some individuals

might believe that a courtroom trial is the only way to obtain justice or a fair outcome, preferring an adversarial process. It is important to stress the overall success rate for mediation and how it allows for creative solutions that address the unique interests of the parties, which, unfortunately, a trial simply does not afford.

Finding an experienced mediator to serve as a neutral third party and assist with legal issues of all types, including personal injury, medical malpractice, professional negligence,

product liability, premises liability, civil rights, and family law matters (divorce mediation and child support) is critical to your success! ♦

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Three-Legged Stool

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ity. Humans’ ability to maintain balance during the locomotive process relies on a continual interaction between perceptual, cognitive, and musculoskeletal systems. These systems also afford us the ability to modulate gait patterns in a way that accommodates the environmental features we encounter. For example, people can alter their stride length to step over a pothole, widen their base of support, lower their center of mass to increase stability on slippery surfaces, or lift a leg higher to clear an obstacle or step up. Successful navigation requires that any necessary modulations be made in advance of the environmental feature, lest a slip or trip occur.

This anticipatory modulation is achieved as a walker gathers information through multiple sensory systems, including the visual system, to perceive the environment by observing it and compiling features such as depth, distance, and incline. This perception can then be used to appreciate one’s environment and guide motor output, making gait adjustments with sufficient time to accommodate the environmental features. Such

perception is achieved through both static and dynamic visual cues. Environmental features, such as shape, position, and material properties of objects, can be appreciated through visual cues from multiple factors, including variation in object colors, texture, or the light reflected by different materials. For example, the presence and location of an object on the floor can be appreciated by the visual disruption in the surface pattern presented by the object and the differential light reflection presented by the object’s material compared to the ground surface. Movement also provides valuable information about objects and surfaces. For example, as people move, some environmental features or other objects become revealed or occluded (also known as deletion/accretion) and are an important cue for depth and elevation changes such as curbs and steps or stairs. This visual processing is continual and does not require conscious awareness.

However, incorporating visual cues to guide one’s locomotion will require the cues to be visibly available. In support of this requirement, as humans walk, they are continually changing the location of their gaze, scanning the environment and fixating on portions that offer goal-

relevant visual information by casting more than half of their glances to areas 12-to-20 feet away and approximately one-fifth of glances two to three steps ahead. This forward gaze affords visual access to critical information for future actions, including environmental characteristics such as transition point attributes, surface characteristics and associated obstacles, layout/path geometry, and lighting conditions. However, as this scanning behavior can be accomplished without conscious awareness, it is not uncommon for individuals to characterize their gaze while walking as “looking straight ahead.” Similarly, the informational value of peripheral vision is also often underestimated, with research showing that peripheral vision alone is often sufficient for successful obstacle detection and avoidance.

Pedestrians can also incorporate sensory input such as tactile feedback and expectancies based on prior experience to guide behavioral responses. For example, under low illumination, pedestrians will often probe the environment with their foot to assist in identifying obstacles or elevation changes. Similarly, prior experience alters expectancies and enables a person to incorporate contextual



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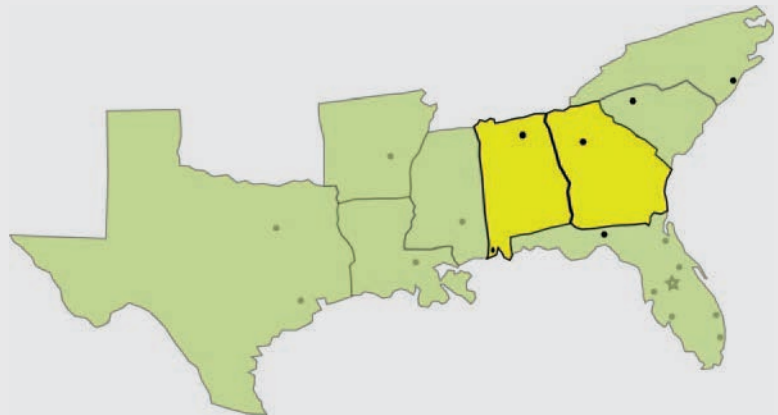
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Three-Legged Stool

Continued from previous page

clues, such as the presence of a railing and shadows to support the appreciation of the presence of stairs into one's understanding of the surrounding environment. This understanding can then be used to proactively modify gait patterns, including (1) initiating avoidance actions such as adjustments to step length, width, and/or height for ground clearance, (2) altering the direction of gait, rotation of the body, or (3) stopping—all actions that can typically be accomplished within one step.

Finally, a slip or trip and fall event caused by a person failing to detect environmental features such as an obstacle or elevation change does not mean that such information was not perceptually available. Rather, it can be the result of insufficient attention or divided attention. Humans have a limited capacity for attention and engaging in additional activities while walking, such as using a cell phone or talking, can reduce the attentional capacity available for the demands of walking. The cognitive processing required for perception of what is visibly available, and the motor control utilized for the mechanics of walking, each presents their own attentional demands.

Distraction can lead to failures of both the perception and the motor control needed for successful locomotion, including failure to detect otherwise readily apparent environmental features, movement variability, and/or the likelihood of movement execution errors. Additionally, there are multiple intrinsic factors that can affect perception of the environment and/or modulation of gait, increasing the likelihood of a slip/trip event and subsequent fall, including age, visual capabilities, medical

conditions, and lower-limb abnormalities, irrespective of the environment.

Injury Causation Analysis

In addition to the evaluation of whether a walkway was code compliant and whether the perceptual factors were sufficient to successfully navigate the incident area, a retrospective understanding of a slip or trip and fall claim can require evaluation of how the fall itself occurred. For example, differentiating between a slip and a trip could be important, as the presence of water or other contaminants on a walkway are typically

“
*... the majority of
 ground-level trip
 and falls result in
 the pedestrian's
 falling forward.*
 ”

relevant for slip claims, whereas evaluation of whether a surface is uniform may be more relevant for trip claims.

In the absence of reliable video or an eyewitness accounting of a fall claim, post-fall medical records and even photographs of the claimant can be informative when assessing the sequence of events leading to a fall. Though not exclusive, the majority of ground-level *slip* and falls result in the pedestrian's falling backwards, whereas the majority of ground-level *trip* and falls result in the pedestrian's falling forward. By reviewing medical records and photographs, an investigator can look for evidence of a scraped or bruised knee, potentially consistent with a forward fall, or complaints of pain or bruising on the elbows or buttocks, suggesting a rearward

fall. Specific shoulder injuries like rotator cuff tears and labral tears are associated with specific load paths when an individual reaches to arrest or “break” their fall, and it may be possible to rule whether the fall is a causative mechanism of a shoulder injury, depending on whether a person falls forward or backward.

The specific constellation of injuries should always be considered in the context of the other information available in a claim file. There is no one-size-fits-all approach to evaluating ground-level falls. However, keeping the three-legged stool in mind (code compliance, ability to perceive and react to a fall, and injury mechanism and fall kinematics) can keep you and your client stable and well supported. ♦

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Nuclear Juror

Continued from page 34

portunity to make an informed decision about using the product and/or avoiding the bad outcome.

The other way internal documents can be inflammatory at trial involves company witnesses testifying in a way that jurors perceive is callous. Not surprisingly, jurors are often inflamed by language in internal emails suggesting that company engineers knew of the risk of X, Y, or Z adverse events and/or that the company engineers made design decisions to reduce production costs and/or protect company profits. In the Georgia boating case, internal emails acknowledged the existence of adverse events, and uncovered a detailed discussion among design engineers about the risk of swamping resulting from wake water flooding the boat. The upshot of internal discussions ended with the company's decision to NOT issue a recall to retrofit the prior model years' design with a safety device and the company's decision NOT to pursue a communications campaign to warn purchasers of prior model year boats of the risk of swamping the passenger area of the boat.

What jurors perceive to be uncaring testimony by company witnesses is often seen as evidence that the defendant refuses to acknowledge any responsibility or accountability for its role in the bad outcome at issue in the instant case. This factor is best illustrated in the multi-billion-dollar jury award in Texas in 2022. In that case, jurors flatly rejected the defendant cable company's contention that the death of the innocent grandmother was 100 percent the fault of the assailant even though he was a company technician who gained entry to the home on his day off while wearing a company uniform and while driving a company van, and

Make the whole trial about the jury and the difficult task before them rather than about opposing counsel. Help jurors to feel smart, capable, and "heard." Take on the role of teacher to convey the essential elements of the case to find in your favor.

the cable company had record of no less than 2,500 reported incidents of theft by employees in the prior calendar year.

Granted, in that case, jurors understood and acknowledged that it was the assailant who wielded the knife that killed the grandmother who surprised him during the home robbery, but jurors fully believed that a series of failures in the company's oversight of that technician laid the groundwork for the attack. Despite what jurors perceived to be these enumerated failures, throughout the trial and immediately thereafter, the company persisted in the argument that 100 percent of the responsibility for the grandmother's death lay at the feet of the technician alone. Even after being handed this multi-billion-dollar verdict, the company maintained all the fault (i.e., 100 percent) lay with the errant technician and that the jury's decision was misguided. This case additionally illustrates the fifth and sixth factors driving nuclear verdicts. Namely, a highly sympathetic plaintiff (i.e., an innocent and beloved grandmother), and a highly plaintiff-friendly venue (i.e., plaintiff-leaning jury pool and/or judiciary).

So, what are defendant companies to do to avoid nuclear verdicts? A company is likely to have greater success escaping a nuclear verdict if it employs a multi-prong trial strategy involving jury selection, in addressing accountability in every part of the trial (i.e., in voir dire, during openings, in closing, in company witness testimony, and in post-event remedial measures), in framing the

damages discussion, and in addressing case specifics (i.e., OSIs, recalls and/or bad documents).

What to do in jury selection? Start your preparations well in advance of jury selection with a pre-trial motion to raise the court's awareness regarding improper questions and the ubiquitous "reptile strategy," its tactics, and its language. Often during trial, plaintiff counsel introduces exaggerated standards by which jurors are encouraged to measure and evaluate the defendant's product design or the company conduct. This effectively shifts the psychological burden of proof to the defense—to prove it met the heightened expectations of the company's conduct (i.e., beyond "ordinary care" or "reasonable care" to "perfect care").

Consider involving appellate counsel in jury selection to assist in weighing and guiding game time decisions and in preserving the record for appeal. If it is permitted, utilize a supplemental juror questionnaire if doing so is more likely to help the defense than it would the plaintiff. A supplemental juror questionnaire can be very effective to uncover juror biases. Demonstrate to the court that counsel has "done its homework" to identify the applicable standards for cause and hardship challenges in the venue. Finally, in closing, connect the verbal commitments of jurors during voir dire to set aside sympathy and/or anti-corporate sentiment to the hard job incumbent on jurors in deliberations to render justice.


What about accountability as a company? Pay attention to the

company's tone in opening statements and closing arguments. Craft your statements and language carefully as words matter. Make the whole trial about the jury and the difficult task before them rather than about opposing counsel. Help jurors to feel smart, capable, and "heard." Take on the role of teacher to convey the essential elements of the case to find in your favor. Start preparing witnesses early in the case before depositions. Help company witnesses (especially safety engineers) to recognize and evade "reptile" traps cloaked in language that heightens the burden of proof from reasonable conduct to perfect conduct. Work with company witnesses before deposition to reduce the likelihood that witnesses will endorse a standard of care predicated on the company exercising perfect conduct. For example, before deposition, teach witnesses how to listen for loaded language

and how to push back upon opposing counsel when he/she suggests "a company has an obligation to not endanger the public, right?" or "a company endeavors to make products that are safe, right?" and other questions with a similar thrust. Witnesses should be ready for the "reptile strategy" questions that sound like they should garner a definitive "yes" or "no" response and questions that utilize absolute language (e.g., "always" and "never"). Prepare witnesses to acknowledge the company's role and responsibility for what jurors will consider its responsibility—to be accountable.

For example, the cable company mentioned earlier might have done better if it had acknowledged some responsibility for some aspect of the circumstances precipitating this horrific event. To be clear, that's not to say the company should have said, "We are respon-

sible for this poor grandmother's death because the assailant had one of our vans." Rather, simply acknowledging that the company takes customer safety seriously is essential. One way the company protects the public is by ensuring that technicians return all company vehicles in at the end of their work shift. Alternatively, perhaps the company routinely calls ahead to notify the customer of an impending visit to ensure that assailants posing as technicians do not wrongfully gain entry to a customer's home. By taking a strident tone in denying all accountability for the tragic death of the beloved grandmother, the company effectively told the jury, "We haven't learned anything." This in turn invited the jury to teach the company a safety lesson, and it did so through a multi-billion-dollar award.



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What to do on damages? Anchoring the damages discussion is critical. Whether to offer an alternative number is a very tough strategic decision that demands a lot of attention. Should the company offer an alternative damages figure or not? If the company has a reasonable shot to win on liability, offering a damages figure “yanks the rug” from under defense-minded jurors in deliberations as plaintiff jurors say, “Even the company feels it should pay \$X.” If the company has absolutely no shot of winning liability, offering an alternative damages figure may be strategically smart. How much should the company offer in non-economic damages? Beware of making the damage figure too high, as it will invariably become “the floor” in deliberations. If, on the other hand, the defense figure is perceived as too low, it may cause a boomerang effect with jurors be-

coming angry with the company or may otherwise undermine the efficacy of the conciliatory tone taken by the company in closing. We recommend that the defense not concede a multiplier as that can quickly escalate to figures that are astronomical. Rather, consider a percentage of the economic damages to effectively anchor jurors’ discussion.

As for case specific factors such as OSIs, jurors are often amenable to hearing of post-event remedial measures the company has put in place since the adverse event that gave rise to the suit. Again, the cable company facing the family of a dead beloved grandmother might have fared better if it had acknowledged that the company knew about incidents of theft by employees and that it has attempted to eradicate that problem through X, Y, and Z measures.

In the final analysis, the defense must choose the battleground for trial. Concede points that are relatively inconsequential in the long run. Don’t argue every point (e.g., don’t fight about whether the plaintiff would have gotten that promotion to shift manager after several years, and a 10 percent increase in salary). Give to get. Give on some points to get credibility on other more important points. Remember, it’s the supple tree that survives the storm. ♦

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